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## By Hannis Taylor

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# THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION

# THE ORIGIN AND GROWTH

OF THE

# AMERICAN CONSTITUTION

## An Historical Treatise

IN WHICH THE DOCUMENTARY EVIDENCE AS TO THE MAKING OF THE ENTIRELY NEW PLAN OF FEDERAL GOVERNMENT EMBODIED IN THE EXISTING CONSTITUTION OF THE UNITED STATES IS, FOR THE FIRST TIME, SET FORTH AS A COMPLETE AND CONSISTENT WHOLE


By HANNIS TAYLOR

HON. LL.D. OF THE UNIVERSITIES OF EDINBURGH AND DUBLIN

*Formerly Minister Plenipotentiary of the United States to Spain; author of "The Origin and Growth of the English Constitution"; "International Public Law"; "Jurisdiction and Procedure of the Supreme Court of the United States"; "The Science of Jurisprudence"*
*(presented to the Institute of France, March 13, 1909)*


"Nec temporis unius, nec hominis esse constitutionem Reipublicæ." — CICERO.

"And thus it comes to pass that Magna Carta, the Acts of the Long Parliament, the Declaration of Rights, the Declaration of Independence, and the Constitution of 1787 constitute the record of an evolution." — BRANTLY.

"History is studied from documents. Documents are the traces which have been left by the thoughts and actions of men of former times. . . . There is no substitute for documents: no documents, no history." — CH.-V. LANGLOIS.

"Under every shell there was an animal, and behind every document there was a man." — TAINE.


BOSTON AND NEW YORK
HOUGHTON MIFFLIN COMPANY
The Riverside Press Cambridge
1911

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*Published June 1911*

TO MY BEST FRIEND

My Wife

# PREFACE

A LONG time has elapsed since the author undertook to draw out "The Origin and Growth of the English Constitution," within the limits of two octavo volumes, the first of which is in the eighth edition, the second in the fourth. The very cordial reception given to that work throughout the English-speaking world and beyond it naturally suggested a sequel to be entitled "The Origin and Growth of the American Constitution," which has been completed on the same plan.

After thirty years of effort to unfold the histories of the two closely related constitutions as one progressive development, the author was blessed with a piece of good fortune which has more than requited all the labor bestowed. That good fortune consisted of the unearthing of a priceless document, very near the surface, which has cast a bright light into what was heretofore a very dark place. It explains for the first time the real history of the invention of that marvelous system of government, partly federal and partly national, given to the world by the Federal Convention at the close of its labors at Philadelphia on September 17, 1787. Beyond that point the influence of the document in question does not extend,—except in one important particular it sheds no new light on the after history. So far as this book is concerned, it is a mere episode, simply one link in a long chain of causation presented herein as a connected whole. It is, however, a great thing to know for certain that the most notable of all political inventions had a personal inventor; that the entirely unique and path-breaking creation embodied in the American Constitution came into being in a perfectly normal way; that its birth was neither mythical nor miraculous. Beginning upon that sane basis an effort has been made to unfold the growth of that Constitution according to the Historical Method, which regards all law, public and private, as a living and growing organism that changes as the relations of society change. When that method is applied to such data as are contained in printed documents, the growth of constitutions may be worked out by processes almost as exact as those employed in physical science. As Bishop Stubbs has happily expressed it: "I confess that to me, as an old investigator, a good deal of the accepted theory of continuous history, in this region, at least, of history, seems to rest on arguments as sound, within its own material and area, as

those on which Copernicus and Kepler worked out their astronomical conclusions."

Never in the constitutional life of any people has the organic development been so vast and rapid as that which has taken place here since the existing Federal Constitution went into effect. During the very short period in which the thirteen scattered communities that fringed our Atlantic seaboard toward the close of the seventeenth century have been expanding across the continent, the dissolving views of change have followed each other like the pictures in a panorama.[1] In expanding with that expansion, in adapting itself to the changed relations resulting therefrom, the American Constitution has developed an elasticity, a growing-power entirely beyond the cumbrous process of amendment its terms provide. When the Thirteenth, Fourteenth, and Fifteenth Amendments, involving a single subject-matter, are considered, as they should be, as a single transaction, the fact remains that the Constitution of the United States has been amended in a formal way only once since 1804, a period of one hundred and seven years. And yet during all that time it has been passing rapidly, despite its rigid and dogmatic form, through a marvelous process of unparalleled development, chiefly through the subtle agency of judge-made law ever flowing from a generous fountain, the Supreme Court of the United States.[2]

The outcome of our organic development, registered as it is in written constitutions and in the vast and unwieldy mass of judge-made law through which they have been interpreted, is an indivisible whole which cannot be mastered piecemeal, — it cannot be clearly expounded as a series of broken and disjointed fragments. To the mind that cannot deal with our complex body of law, state and federal, as a living and growing organism, its real meaning must forever remain a sealed book. Difficult as the problem is, the task is somewhat lightened by the fact that the period of growth to be mastered embraces less than a century and a quarter, a period whose history is profusely illustrated by

[1] "Our development has run so fast and so far along the lines sketched in the earlier day of constitutional definition, has so crossed and interlaced those lines, has piled upon them such novel structures of trust and combination, has elaborated within them a life so manifold, so full of forces which transcend the boundaries of the country itself and fill the eyes of the world, that a new nation seems to have been created which the old formulas do not fit or afford a vital interpretation of." Woodrow Wilson, Address before American Bar Association, August 31, 1910.

[2] An inspection of the annotated Constitution in Appendix XX, will disclose the fact that it has been construed by the Supreme Court in nearly fourteen hundred cases, which, if printed separately in the official form, would fill about fifteen volumes of the Reports.

a series of documents, all of which are now accessible. There is no longer a place for the withering legends of supernaturalism, or for myths and traditions that defy the ordinary rules of common sense.

M. Lenôtre — a worthy representative of that school which has dethroned romanticism in every branch of French literature — has said: "History, as it has too long been written, is similar to stage scenery when seen from the body of a theatre. Everything is in perfect order, everything is logical and in its place, everything appears to be solid and real — provided you do not go behind the scenes, that is to say, provided you do not study the facts in the heaps of authentic documents stored in the record office. For if you investigate, you will discover that the building has only a front, and that it is kept upright only by the aid of cords and pegs." The student of American constitutional history has no reason to fear to go behind the scenes, — the real facts as attested by the documents are quite as wonderful as anything we have been accustomed to believe. In the light of the real facts as attested by the documents, an attempt has been made herein to outline, with frequent elaborations, the origin and growth of the American Constitution in such a way as to enable every American citizen, layman as well as lawyer, to read within narrow limits the entire history of the wonderful Constitution under which he lives.

Two editions of the epoch-making document to which reference has been made, with the author's commentary upon it, have been published by Congress, in an unusual form, and spread broadcast. In that regard the author is indebted to his good friends, the Hon. Thomas H. Carter, the able and distinguished United States Senator from Montana, who has given special study to the subject; and to the Hon. William E. Chandler, formerly United States Senator from New Hampshire, and Secretary of the Navy, whose brilliant and incisive mind is ever open to new revelations.

WASHINGTON, D. C.,
*November*, 1910.

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# THE ORIGIN AND GROWTH
## OF THE
# AMERICAN CONSTITUTION

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## CHAPTER I

### INTRODUCTORY

Sources of English and American Constitutions only recently explored.

No effort was ever made to write the history of the English Constitution until very recent times, and when the work did begin the historians confined themselves almost entirely to the aftergrowth, leaving the initial period, the starting-point of everything, almost untouched. Hallam began his "Constitutional History" with the accession of the House of Tudor, — three meagre chapters in the "Middle Ages" contain all he desired to say of the formative epoch. Macaulay's "History of England" really begins with the accession of the House of Stuart, — into a single chapter are condensed the reflections of the most brilliant and inquisitive of Englishmen upon the ten eventful centuries preceding that event. Only within the last seventy years have the charters, chronicles, and memorials in which was entombed the early history of the English Constitution been made accessible; and only within the last forty have they been subjected to the final analysis which at last extracted from them their full and true significance.[1] In the same way the three most famous foreign expounders of the American

[1] The good work feebly begun by Sharon Turner in his *History of the Anglo-Saxons*, published between 1799 and 1805, was greatly advanced by Kemble, who published his *Codex Diplomaticus Ævi Saxonici* in 1839, and his *Saxons in England* in 1848. Thorpe published his *Ancient Laws and Institutes of England* in 1840; Sir Francis Palgrave, *The Rise and Progress of the English Commonwealth* in 1832, and the *History of Normandy and England*, 1851–64. Not, however, until Freeman had completed his *History of the Norman Conquest*, not until Bishop Stubbs had completed the *Constitutional History*, the *Select Charters*, and "the wonderful prefaces" — all within very recent years — did the grand inquest into the sources of the English Constitution which Kemble and Palgrave had inaugurated, reach a definite and final result.

Constitution have dealt seriously only with its aftergrowth, without any real effort to ascertain the source from which the entirely new plan of federal government it embodies was derived. Their work began with the remarkable series of observations published in 1835 by Alexis de Tocqueville, "De la démocratie en Amérique," a treatise on democracy in general, with striking illustrations drawn from its American history. By far the most notable part of that performance was embodied in the declaration that our second Federal Constitution of 1789 is based "upon a wholly novel theory which may be considered a great discovery in modern political science. . . . The American states, which combined in 1789, agreed that the Federal Government should not only dictate but should execute its own enactments. In both cases the right is the same, but the exercise of the right is different; and this difference produced the most momentous consequences."[1] Tocqueville was the first to inform trained students of the science of politics that upon the ruins of the Articles of Confederation an entirely new federal fabric had arisen without a prototype in history, — a fabric based on a "wholly novel theory." But beyond that point he did not attempt to go; as to the origin or authorship of the "great discovery in modern political science," he made no inquiry whatever. To that part of the subject he contributed only a barren statement: "This national convention (1787), after long and mature deliberation, offered to the acceptance of the people the body of general laws which still rules the Union. All the states adopted it successively."[2]

Tocqueville, 1835.

His description of the "wholly novel theory."

Forty years later we have "The Constitutional and Political History of the United States," by Dr. H. von Holst, who signed his preface at Freiburg in 1875. The fact that his first chapter is entitled, "The Origin of the Union, the Confederation, and the Struggle for the Present Constitution," is a clear indication that he felt called upon to make some explanation as to the origin of the "wholly novel theory" of federal government the existing Constitution embodies. The result, however, was only this unedifying recitation: "Nearly four months elapsed before the delegates could agree upon a plan of which they said to themselves, with Hamilton, that it is not possible

Von Holst, 1875.

[1] *Democracy in America*, i, 198, 199, Bowen ed.

[2] Ibid., i, 142.

to hesitate between the prospect of seeing good come from it, and anarchy and confusion. On the 17th of September it was unanimously resolved that the plan should be adopted by the states represented at the time, which was done." And yet despite that colorless and inaccurate description of what actually occurred on the day the Convention adjourned, Von Holst, with his critical and practical German mind, did clearly perceive the absurdity, the childishness of what he well termed the "Inspiration Theory," by which he said the American people were enthralled. To use his own words: "The masses of the American people, in their vanity and too great self-appreciation, are fond of forgetting the dreadful struggle of 1787 and 1788, or of employing it only as a name for the 'divine inspiration' which guided and enlightened the 'fathers' at Philadelphia. . . . This is not a mere idle phrase; it is one of the standing formulas in which the self-complacency and pride of a people who esteem themselves special objects of the care of the Ruler of the Universe find expression. We reproduce one illustration of this, out of a whole multitude. In the 'North American Review' (1862, i, 160) we read: 'Such a government we regard as more than the expression of calm wisdom and lofty patriotism. It has its distinctively providential element. It was God's saving gift to a distracted and imperiled people. It was his creative fiat over a weltering chaos: 'Let a nation be born in a day.'" [1] After ridiculing in that fashion the grotesque assumption he was the first to label the "Inspiration Theory," Von Holst adds: "In Europe this view of the case has been generally accepted as correct." Thus it appears that while the broad and philosophical German publicist made no real attempt to ascertain the source from which the new American type of federal government was derived, he was fully impressed with the pitiful absurdity of attributing to it a supernormal origin through a "creative fiat" from on high.

Ridicules the "Inspiration Theory."

Fails to examine sources.

In 1888 appeared "The American Commonwealth," by the Rt. Hon. James Bryce, a monumental work praised by all, whose primary purpose is declared to be the ascertainment of "three main things that one wishes to know about a national commonwealth, viz., its framework and constitutional machinery, the methods by which it is worked, the forces

Bryce, 1888, scope of work defined.

[1] Vol. i, pp. 62–63, and note 1 on p. 63.

which move it and direct its course." [1] When this now famous exposition is viewed as a whole, it clearly appears that its primary purpose is to describe the operation of the "constitutional machinery," after the unique federal fabric of 1789 had entered upon its career. In so limiting the scope of the work the author says: "How did so complex a system arise, and what influences have moulded it into its present form? This is a question which cannot be answered without a few words of historical retrospect. I am anxious not to stray far into history because the task of describing American institutions as they now exist is more than sufficiently heavy for one writer and one book." [2] Then follows a brief chapter entitled "The Origin of the Constitution," a title clearly indicating that some explanation is to be made as to the source from which the "wholly novel theory" of federal government embodied in the Constitution was derived. Nothing could be more profoundly disappointing than the result. There is no recognition whatever of the fact that out of the work of the Federal Convention emerged a new federal fabric without a prototype in history, — a federal fabric armed for the first time with the power to tax; a federal fabric divided for the first time into three departments, executive, legislative, and judicial; a federal fabric endowed for the first time with a two-chamber legislature; a federal fabric endowed for the first time with a judiciary capable of putting the stamp of nullity on national and state laws; a federal fabric operating for the first time directly on individuals and not on states as corporations. As attributes of *a federal government* these five were "absolutely new." Against Tocqueville's unanswerable declaration that "this Constitution . . . rests in truth upon a wholly novel theory which may be considered a great discovery in modern political science," a discovery which has "produced the most momentous consequences," Mr. Bryce sets only the negative and entirely inadequate statement that "There is little in this Constitution that is absolutely new. There is much that is as old as Magna Carta." [3] There is an entire failure to differentiate the new federal

Failure to recognize originality of new federal system.

[1] Vol. i, p. 5.

[2] Ibid. 18.

[3] Ibid. 29. The statement is inadequate and misleading because it refuses to admit the manifest fact, so luminously stated by Tocqueville, that a "wholly novel" form of federal government had come into existence, endowed with five basic attributes never before possessed by

fabric — as unlike any preëxisting federal fabric as a modern mogul engine is unlike an ancient stagecoach — from the traditional English law worked into it as a part of its machinery. No federal principle embodied in the American Constitution was derived from the mother country, for the simple and conclusive reason that in the consolidated state known as England there is no federalism in any form. Great as the fathers were, they could not draw from an empty well. After the path-breaking idea of a federal government with the power to tax had been established as the basic concept, a self-sustaining federal system resulted as a corollary; and the several parts of that system were then organized according to English law and practice. Why was it that the three famous foreign expounders of the American Constitution, who have so learnedly and luminously drawn out its aftergrowth, failed to shed any light whatever upon the origin of the unique federal creation it embodies? The answer is easy. The fault lies at the door of American historical scholarship, which had failed to furnish them with the necessary data. No attempt was made here to write the history of the proceedings of the Federal Convention until sixty-seven years after its adjournment; and the tardy inquiry then instituted has only reached the sources within the last few years.

No federal principle derived from England.

Fault of American historical scholarship.

The Federal Convention of 1787, which shrouded its proceedings in a secrecy as profound as that which incloses a masonic lodge, sealed its records at the close and committed them to Washington with the injunction "that he retain the Journal and other papers subject to the order of Congress, if ever formed under the Constitution."[1] It was understood that the members would regard all that occurred as confidential, and in general that understanding was lived up to. Both Washington and Madison earnestly insisted that the proceedings of the Convention should not be made public during the lifetimes of the members, or at least not so long as the opinions any member might have expressed in debate should in any way be used to his prejudice.[2] Not until 1818 did Congress partially break

Federal Convention secret as masonic lodge.

any federal system, and therefore "absolutely new."

[1] *Documentary History of the Constitution*, iii, 769–770.

[2] J. Q. Adams, *Memoirs*, iv, 175; *Documentary History of the Constitution*, v, 310; Max Farrand's admirable monograph, entitled *The Records of the Federal Convention*, 45. Reprinted from *The American*

Seal only partially broken in 1818.

the seal of that secrecy by a joint resolution directing the publication of the "Journal . . . and all Acts and Proceedings" of the Convention in possession of the Government.[1] But through that disclosure we received only a fragment, as the so-called Journal had been made up by an official secretary who, either through incompetence or neglect, kept what, according to Adams, "were no better than the daily minutes from which the regular Journal ought to have been, but never was, made out."[2] The real record of the proceedings of the Convention, prepared by the semi-official reporter, James Madison, and now embodied in the three volumes of his priceless "Papers," was not published by Gilpin until 1841. In that way fifty-four years passed by, after the adjournment of the Convention, before the full report of its secret proceedings was given to the world. During that half-century of mystery and suppression it was that the mythical history of what actually took place in the secret conclave crystallized into a series of misty and misleading impressions so fixed in the minds of many that it is now difficult to dislodge them even with the aid of clear and explicit documentary evidence. "My siege is finished," exclaimed Vertot, when offered new documents which stultified his narrative. In the same spirit many of the devotees of the "Inspiration Theory," so justly ridiculed by Von Holst, still respond even when the connected documentary history of all that occurred is offered them.

Full record not published until 1841.

Story's commentary, 1840.

In 1840, just a year before the publication of the "Madison Papers," Mr. Justice Story published "a brief commentary on every clause [of the Constitution], explaining the true nature, reasons, and objects thereof; designed for the use of school libraries and general readers." From the three pages devoted to the "Origin of the Constitution" only this can be extracted: "Congress adopted the recommendation of the Report, and in February, 1787, passed a resolution for assembling a Convention accordingly. All the states, except Rhode Island, appointed delegates; and they met at Philadelphia. After very protracted deliberations, and great diversities of opinion, they finally, on

Only a colorless statement.

*Historical Review*, vol. xiii, no. 1, Oct., 1907.

[1] The *Journal, Acts and Proceedings* were printed at Boston, 1819. The *Journal* was reprinted in 1830 as vol. iv of 1st ed. of Elliott's *Debates*.

[2] J. Q. Adams, *Memoirs*, iv, 385.

the 17th of September, 1787, framed the present Constitution of the United States, and recommended it to be laid by the Congress before the several states, to be by them considered and ratified, in conventions of the representatives of the people, to be called for that purpose." [1] Nothing more was said by one of the most cultured jurists of that epoch as to the origin of the "wholly novel theory" of federal government, described by Tocqueville five years before as "a great discovery in modern political science" which had "produced the most momentous consequences." The midnight was still deep indeed.

George Ticknor Curtis, 1854.

Not until sixty-seven years after the adjournment of the Federal Convention did an American attempt to write the "History of the Origin, Formation, and Adoption of the Constitution of the United States." That attempt, made by Mr. George Ticknor Curtis in 1854, opens with the statement that "A special history of the origin and establishment of the Constitution of the United States has not yet found a place in our national literature." [2] When we look into that first effort for light as to the origin of the "wholly novel theory" of federal government we are told, in a description of conditions immediately preceding the meeting of the Convention, that "The idea of a Union founded on the direct action of the people of the states, in a primary sense, and proceeding to establish a federal government, of limited powers, in the same manner in which the people of each state had established their local constitutions, had not been publicly broached, and was not generally entertained." [3] That statement was made in the teeth of the fact that four years before, as early as February 16, 1783, Pelatiah Webster had published at Philadelphia at the very doors of Congress a pamphlet of forty-seven pages, not only discussing publicly the entire subject, but putting forth as his invention the vitals of the new system adopted at Philadelphia in 1787. Mr. Curtis tells us that "The first public proposal of a Continental Convention is assigned by Mr. Madison to one Pelatiah Webster, whom he calls 'an able, though not conspicuous citizen,' and who made this suggestion in a pamphlet published in May, 1781. Recent researches have not added to our knowledge of this writer." [4] If those researches had been

Pelatiah Webster's call for a "Continental Convention," 1781

[1] Page 34.
[2] First words of the preface.
[3] Vol. i, p. 373.
[4] Ibid., p. 350, note 3.

a little more diligent, Mr. Curtis would have found the epoch-making paper of February 16, 1783, which would have saved him from the confession that he really had nothing to offer as an explanation of the origin of the new system whose history he was the first to write. His only contribution to the question of questions is this: "The Constitution of the United States was eminently the creature of circumstances; — not of circumstances blindly leading the blind to an unconscious submission to an accident, but of circumstances which offered an intelligent choice of the means of happiness, and opened, from the experience of the past, the plain path of duty and success, stretching onward to the future." [1] While Mr. Curtis declined to restate the "Inspiration Theory" in clear and definite terms, he admitted negatively by that misty and pointless platitude that he had nothing whatever to substitute for it.

Curtis's misty platitude.

Bancroft, 1882.

In 1882 the Hon. George Bancroft published his "History of the Formation of the Constitution of the United States of America," in two volumes, devoted to the proceedings of the Federal Convention of 1787, and the events out of which it arose. By that time the midnight had begun to break a little. Bancroft had heard not only of Pelatiah Webster's call for a Continental Convention to make an entirely new Constitution, put forth in 1781, but also of the great paper of February 16, 1783, to which he refers in these terms: "The public mind was ripening for a transition from a confederation to a real government. Just at this time Pelatiah Webster, a graduate of Yale College, in a dissertation published at Philadelphia, proposed for the legislature of the United States a Congress of two houses which should have ample authority for making laws 'of general necessity and utility,' and enforcing them as well on individuals as on states. He further suggested not only heads of executive departments but judges of law and chancery. The tract awakened so much attention that it was reprinted in Hartford, and called forth a reply." [2] If Bancroft ever read as a whole the great document in question — an assumption his vague and trivial reference to it goes far to rebut — he entirely missed the path-breaking concept with which it opens and upon which its importance depends. He makes no reference whatever to Webster's proposal of a self-sustaining federal

Reference to paper of Feb. 16, 1783.

Failure to grasp its meaning.

[1] Curtis, i, 382.

[2] Bancroft, i, 86.

system with the sovereign power to tax, — a power never possessed before by any federal government in the world's history. But if Bancroft, who was a layman not a jurist, failed to perceive that in Webster's invention originated the "wholly novel theory" described by Tocqueville, he did realize the importance of the "plans," carefully prepared beforehand, through which the "great discovery in modern political science" passed from the inventor to the Convention itself. And yet he fell into grave confusion as to the history of those plans, the second of which he called the "Connecticut plan," prepared, he says, at Philadelphia by Roger Sherman before the 19th of June, and supported by the entire Connecticut delegation.[1] The author has had occasion long ago to demonstrate from the records that the so-called "Connecticut plan" had no existence outside of Bancroft's imagination; that no such plan was ever offered by Roger Sherman in the Convention, or supported therein by the delegates from Connecticut.[2] Bancroft was also far afield as to the history and importance of the Pinckney plan. Since his death, Professor Jameson and ex-Chief-Justice Nott have, in a luminous and convincing way, demonstrated the genuineness of the copy of that all-important plan furnished by Pinckney to the Secretary of State in 1818. While establishing the fact that the Pinckney plan was really the most important before the Convention, these two special workers have lifted from the brilliant record of the young South Carolina statesman a dark cloud which has rested upon it most unjustly for nearly a century. In indulging in these criticisms the author has no desire whatever to discredit the work of Bancroft, which is excellent and helpful in many particulars. His one purpose is to emphasize the fact that we are now only upon the threshold of the study of the history of the American Constitution; the documents upon which that history depends are just being assembled by the source-workers (what the Germans call *Quellenstudien*), who are striving to extract from them their real significance. Only by that rational and painstaking process can we hope to rescue the true

His so-called "Connecticut plan."

Far afield as to Pinckney plan.

Study of American Constitution just begun.

[1] He plumed himself upon his supposed discovery of this purely imaginary plan described in his preface (p. vi) and twice in vol. ii, pp. 36, 89.

[2] See the author's article, entitled "A Bancroftian Invention," in the *Yale Law Journal* for December, 1908.

account of the greatest political event in the world's history from the twilight of fable by which it has been too long obscured.

First Constitution servile copy of ancient type of league.

After the completion of "The Origin and Growth of the English Constitution," the author took up the investigation of "The Origin and Growth of the American Constitution" at the point at which Bancroft had left it. In dealing with the distinctively federal part of the system he perceived at once that our first Federal Constitution as embodied in the Articles of Confederation was simply a servile copy of that ancient type of a federal league whose monotonous history extends without material variation from the Greek confederations down to the rise of the Seven United Provinces of the Netherlands, whose articles of association were taken as the standard for imitation.

Drafted by Franklin and Dickinson.

Franklin, who made the first draft of the Articles in 1775, and Dickinson the second in 1776, showed no fertility of resource whatever. They simply reproduced the antiquated form of a federal league with no federal executive, no federal judiciary, with all federal powers vested and confused in a one-chamber assembly devoid of the power to tax and devoid of jurisdiction over individuals, — an assembly in which every state, great and small, had one vote. Such was the nature of the league adopted by Congress in November, 1777, and recommended to the states. Just ten years later emerged from the Federal Convention at Philadelphia the entirely unique system, different in every vital particular from the first, and described by Tocqueville as "a great discovery in modern political science."

Within ten years great invention made.

Thus it is evident that, within a period of ten years, some man or body of men made a great discovery or invention that has revolutionized federal government not only in this country but throughout the world. Certainly in regard to the origin of what is perhaps the most important political invention in the world's history there should be at least a theory. And yet the marvel is that there has been heretofore scarcely anything that could be called a theory. When the essence of everything said by the expounders, native and foreign, on the point at issue has been extracted the result may be formulated in this wise:

Absurd theory of its origin.

At some time during the eighty-six working days of the Convention there was evolved through a process, probably supernormal, from the combined brains of eminently wise men,

called by Jefferson "an assembly of demigods," the entirely new creation fully armed, just as Pallas was evolved from the brain of Jove. In prefacing the miraculous event Bancroft indulges in this rhapsody: "Do nations float darkling down the stream of the ages without hope or consolation, swaying with every wind and ignorant whither they are drifting? or, is there a superior power of intelligence and love, which is moved by justice and shapes their course? From the ocean to the American outposts nearest the Mississippi one desire prevailed for a closer connection, one belief that the only opportunity for its creation was come." [1] As a companion piece should be repeated here the "illustration" of that peculiar state of mind used by Von Holst: "It was God's saving gift to a distracted and imperiled people. It was his fiat over a weltering chaos: 'Let a nation be born in a day.'" After a twentieth-century mind trained in the historical school has been sickened by that kind of literature, whose mediæval flavor suggests the "Faust-book" from which Goethe drew the supernormal parts of his immortal epic, the practical question recurs: Is there the slightest evidence that the "great discovery," the "wholly novel theory" was created or evolved after the "assembly of demigods" actually met for business? The answer is that there is quite a volume of clear, explicit, and detailed documentary evidence, collated in the appendices hereto, and absolutely uncontradicted in any particular, that the "great discovery" was not only made years before the Convention met, but that it was taken there carefully formulated in three prearranged "plans," two of which were presented during the first moments of the first day the Convention met for real business. If the reader will turn to Appendix XII, he will find the Virginia plan, with Madison's three letters, the preparation of which began nearly a year before the Convention met. If he will turn to Appendix XIII, he will find the elaborate plan or "system" worked out by Charles Pinckney at Charleston and described in his "Observations" months before his departure from that city. If he will look to Appendix XIV, he will find Hamilton's plan worked out beforehand so elaborately as a constitution that it might have gone into effect the next day if it had been adopted. When we add to these three plans, identical in all

Bancroft's rhapsody.

Was the invention made after the Convention met?

[1] Vol. ii, p. 3.

vital particulars, and carefully elaborated months before the Convention met, the great paper of February 16, 1783, of which the plans were simply restatements, we have a body of documentary evidence setting forth "the great discovery in modern political science" in four distinct and dogmatic forms. In the face of such a mass of evidence, just as authentic as the Constitution itself, the theory or conceit that the great discovery was made after the Convention met is simply preposterous. As stated already, that purely fanciful assumption, which may be described generally as the "Inspiration Theory," was the outcome of the half-century of mystery during which a masonic secrecy shrouded what actually occurred within the Convention itself.

A preposterous assumption.

Only three plans taken to Convention.

There were only three plans of a new system of federal government taken to the Convention, — the three so elaborately worked out by Madison, Pinckney, and Hamilton months before their departure for Philadelphia. If any member of the Convention was the author of the "new discovery," it was one of these three, — no kind of a claim in that regard can possibly be set up in favor of any other member. Thus it appears from the documentary evidence that the idea that the new invention emerged from the brains of many, in some supernormal way, after the Convention met, is a pure chimera distilled during that half-century of mystery in which the records were under seal. The moment the Convention was organized its first act of business was the formal reception of the two plans drafted by Madison and Pinckney, in which "the great discovery" was not only explicitly set forth in every vital part, but worked by the hand of Pinckney into what he called in presenting it "a system" of government. From that moment to the day of adjournment, the single question before the Convention was this: "In what way and to what extent shall 'the great discovery' as embodied in the prearranged plans be so modified and amended as to adapt it to then existing conditions as a working system of government?" To the attainment of that one mighty end the entire wisdom of the assembly was devoted from May 29, the day upon which the plans were presented, to September 17, the day of adjournment.

Plans of Madison and Pinckney instantly presented.

Plans identical in all vital particulars.

An inspection of the three prearranged plans, drafted so carefully by Madison, Pinckney, and Hamilton, and printed

side by side in the appendices, will reveal the fact that each one embodied in its own way every element of "the great invention," which consisted of a proposal (1) of a federal government with the independent power to tax; (2) of a federal government divided into three departments, legislative, executive, and judicial; (3) of a federal legislature with two chambers; (4) of a supreme federal judiciary; (5) of a federal government operating not on states as corporations, but directly on individuals. Down to the time of the drafting of the Articles of Confederation, into which no one of those principles entered, had any one ever heard of a federal government blessed by the presence of any one of them? Before the Federal Convention of 1787 met, "the great discovery in modern political science" had certainly been made by somebody, because we find it worked out in great detail in the three prearranged plans taken by Madison, Pinckney, and Hamilton to the Convention as the basis of its action. As the evidence is all documentary, there is no room for cavil or question on that point. So the single question to be answered — a question the author was the first to propound — is this: Were the three prearranged plans, identical in every vital particular, drawn from a common source, or were the authors of them, working in isolation and far apart, inspired, at or about the same moment, to make an identical invention for which the world had been waiting for centuries? If they were so inspired, the old "Inspiration Theory" must be put to a more severe test than that to which it was originally subjected. Fortunately at this point the need of supernormal aid is greatly lessened by the fact that neither Madison, Pinckney, nor Hamilton, and, so far as the author knows, no biographer in their behalf, ever claimed that any one of them was the author of "the great invention." If any one of them had ever claimed such authorship, it would have put him at once at the throats of the other two, a conflict that never existed.

Were they drawn from a common source?

On February 16, 1783, Pelatiah Webster — a great political economist and retired financier, the Adam Smith of that epoch, a graduate of Yale, a patriot in the Revolutionary cause, then a mature thinker of fifty-seven, better equipped perhaps than any other man in the country to deal with the vital question of taxation involved — published at Philadelphia, at

Epoch-making invention of Feb. 16, 1783.

the very doors of the Continental Congress, in a pamphlet of forty-seven pages, "the great discovery in modern political science," which was carried to the Federal Convention of 1787 in the three plans prepared by Madison, Pinckney, and Hamilton. At the moment that publication was made, Madison and Hamilton, then young men of thirty-two and twenty-six respectively, were in Philadelphia as members of the Congress in which Charles Pinckney, then twenty-five, took his seat soon afterwards. Even when the three plans drafted by Madison, Pinckney, and Hamilton are taken as one document, they present the great discovery in much less detail than the original in which it was proclaimed. After the adjournment of the Federal Convention, Webster republished his paper with copious notes, restating his claims and appealing to posterity for justice. As Madison frankly states, Pelatiah Webster was the first to propose, as early as 1781, in one of his financial essays, published at Philadelphia in May of that year, the calling of "a Continental Convention" [1] for the making of an entirely new Constitution. Whether any direct reference was made to that proposal, or to the contents of the great paper of February 16, 1783, during the prolonged debates that took place in the secret conclave of 1787, we can never know, as reporters from without were excluded, and reporters that worked within have preserved only partial and inaccurate statements of what was actually said and done. The most careful student of the records declares that we do not know for certain even what votes were taken on particular questions. To use his own words: "In view of these mistakes, and because of the suspicion that would rest upon notes so carelessly kept as were the minutes of the secretary, the printed 'Journal' cannot be relied on. The statement of questions in the great majority of cases is probably accurate, but the determination of those questions, and in particular the votes upon them, require confirmation or can be accepted only tentatively." [2] The fragmentary reports of the speeches that survive are vastly less complete and reliable of course than the Journal itself. When in 1821 Yates printed his notes in full, Madison pronounced the document to be "not only a very mutilated but a very errone-

Madison's testimony.

Imperfect records of votes and debates.

[1] *Madison Papers*, ii, 706–7.

[2] Max Farrand, *Records of the Federal Convention*, 49–50.

ous edition of the matter to which it relates";[1] and J. C. Hamilton warns us that Madison's report of his father's great speech delivered on June 18 is only a very imperfect fragment.[2] Madison has preserved only about three thousand words of a speech that occupied more than five hours in its delivery. If we possessed the full text of that elaborate exposition, reviewing no doubt the entire subject, we might find frequent references by Alexander Hamilton to the work of Pelatiah Webster, with whom he was in official contact as a member of the Continental Congress at the very moment when the document of February 16, 1783, was published at the very doors of that body. Whether any direct reference was made during the four months of debate to that document is, however, of no special significance, as such reference could neither increase nor decrease its authenticity and its importance. It is sufficient for us to know that when the three restatements of its contents, as prepared by Madison, Pinckney, and Hamilton, are placed in juxtaposition with it, the problem involved in the authorship of the plans is solved with the precision of a mathematical demonstration.

Full text might disclose frequent reference to Webster.

The author was the first to work out that problem simply because he was the first to undertake it. It really involved no great amount either of study or research; there was really no opposing theory, worthy of the name, to overthrow, — it was simply a question of filling a vacuum, of removing a set of misty legends which were no credit to our historical scholarship. No great subject was ever so shamefully neglected. Some aid may have been derived by the author from long study of the processes through which Kemble, Palgrave, Stubbs, and Freeman have, in recent years, extricated from the jungle of fable the beginnings of English constitutional history. That work was never undertaken in earnest until 1839, when Kemble began the publication of his "Codex Diplomaticus," whereby "upwards of fourteen hundred documents, containing the grants of kings and bishops, the settlements of private persons, the conventions of landlords and tenants, the technical forms of judicial proceedings, have been placed in our hands." Such inquiries all turn upon a critical examination of

Only a vacuum to be filled.

[1] *Doc. Hist. of the Constitution*, v, 308–312.

[2] *Life of Alexander Hamilton*, ii, 489–490.

"History is studied from documents."

documents. To repeat the words of Langlois: "History is studied from documents. Documents are the traces which have been left by the thoughts and actions of men of former times. . . . There is no substitute for documents; no documents, no history." [1] With the richest accumulation of historical records in all Europe — "whether we consider them in relation to antiquity, to continuity, to variety, to extent, or to amplitude of facts and details" [2] — mouldering beneath their feet, English historical scholars permitted the beginnings of the English Constitution to remain a sealed book down to a time within the memory of men still living. And so we have permitted the beginnings of the American Constitution to remain a sealed book, with the "Inspiration Theory" as its clasp, despite the fact that the clearest and most formal of all documentary evidence as to the truth was easily accessible.

Work of the master builders.

The author desires here to repeat the statement made in the preface that the influence of the great document of February 16, 1783, does not extend beyond the work of the Federal Convention of 1787, — except in one important particular it sheds no new light on the after history. He also desires to anticipate here this statement: "And yet after all has been said, the fact remains that the master builders, who transformed under the most difficult circumstances possible the dream of the great architect into a working system of government, achieved a result just as remarkable as the invention itself. The philosophers, statesmen, jurists, warriors, experienced men of affairs, who composed the august assembly that wrought at Philadelphia in 1787, may be compared, as to genius and learning, with the master spirits of any age . . . they need no fame that belongs to another." While the epoch-making achievement of Pelatiah Webster must forever stand forth as a beacon light in the world's political history, so far as this book is concerned, it is a mere episode, simply

Need no fame that belongs to another.

[1] "L'histoire se fait avec des documents. Les documents sont les traces qu'ont laissées les pensées et les actes des hommes d'autrefois. . . . Car rien ne supplée aux documents: pas de documents, pas d'histoire." *Introduction aux études historiques*, par Ch.-V. Langlois — Ch. Seignobos, 2d ed., p. 1, Paris.

[2] The words of Sir Francis Palgrave, under whose auspices as deputy keeper the public records were, in 1858, finally brought together under the roof of the present Record Repository.

one link in a long chain of causation. The publication and distribution by Congress of the great document, with the author's commentary upon it, has done much already to remove false impressions of long standing. And yet there is still here and there an ancient jurist or statesman, whose mind has ceased to be receptive of new facts, who resents any attempt to disturb the illusions of his earlier years. Pelatiah Webster's *alma mater*, the University of Yale, still treats with scornful silence the fame of her immortal son. In all this there is nothing out of the usual course. The achievements of contemplative men, especially when they are far-reaching, have often had to wait for a long time for full recognition. Not until after the lapse of two hundred years was it admitted that Velasquez was one of the mightiest painters the world had ever known; it was quite as long perhaps before Shakespeare, as a world-poet, was permitted to enter into the full possession of his kingdom.

# CHAPTER II

## THE GREAT DISCOVERY IN MODERN POLITICAL SCIENCE

Evolution and conscious creation contrasted.

AFTER a thousand years of persistent development in an island world the dominant state in Britain known as England reproduced itself in each of the thirteen colonial commonwealths out of whose union arose the Federal Republic of the United States. Just as these preëxisting commonwealths were the natural products of a political evolution, so the Federal Union into which they finally entered is an artificial and entirely novel creation without a precedent in history. Mr. Gladstone graphically, perhaps unconsciously, portrayed the basic difference in origin between the two systems, state and federal, when, in a well-worn phrase, he said: "As the British Constitution is the most subtile organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

Why the states should be first studied.

Tocqueville was wise when he said that "To examine the union before we have studied the states would be to adopt a method filled with obstacles. . . . The great political principles which now govern American society undoubtedly took their growth in the state." [1] The political substructure of every American state is that "subtile organism which has proceeded from progressive history," properly described not as the British but as the English Constitution, because it is the constitution of that single state in Britain known as England which has reproduced itself in a somewhat modified form in the constitution of every state, old and new, of the American Union. When the tie of political dependence that bound the colonies to the mother country was severed, the English provinces in America rose to the full stature of sovereign states.

Taney's definition of state sovereignty.

As Chief Justice Taney has expressed it: "When the Revolution took place, the people of each state became themselves sovereign"; and so soon as they "took into their own hands the

[1] *Democracy in America* (Bowen's ed.), i, 73, 74.

powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or the Parliament, became immediately and rightfully vested in the state." [1] Thus every student of the American Constitution is forced to begin with an inquiry into the origin and growth of the Constitution of that state in Britain we call England whose foundations were laid by the Teutonic invaders who, between the middle of the fifth century and the end of the sixth, built up in Britain "a Germany outside of Germany." [2] Out of the Teutonic settlements thus made finally arose the consolidated Kingdom of England which represents an aggregation of shires; the shire an aggregation of hundreds; the hundreds an aggregation of townships. Upon the substructure thus made up of local, self-governing communities the English political system has ever depended for its permanency, its elasticity, its enduring power. In every one of these communities the idea of local self-government was intensely developed, and in each were embedded the germs of the representative system. And from the tendency, conscious or unconscious, upon the part of Englishmen to reproduce these self-governing communities in other lands has resulted the ascendancy and power of the English nation as a colonizing nation.

Consolidated Kingdom of England.

When the offspring is compared with the parent, when the English state in America is compared with the English state in Britain, the resemblance is too close for the relationship to escape the most careless observer. In both, the political substructure is the same — the ancient Teutonic system of local, self-governing communities composed of the township, the hundred, and the shire. In each, municipal organization rests upon substantially the same foundation. So far as central organization is concerned, every American state is a mere reproduction of the central organization of the English kingdom with such modifications as have resulted, in a widely different physical environment, from the abolition of nobility, feudality, and kingship. In the new as in the old, the central powers of the state are divided into three departments, — legislative, executive, and judicial, — which, in the same qualified sense, are separate and distinct from each other.

Offspring compared with parent.

[1] Martin *et al. v.* The Lessee of Waddell, 16 Peters, 410, 416.

[2] Taine, *Hist. of Eng. Literature*, i, 50.

Sources of American federal ideas.

When the time came for the English states in America to construct a federal union on *a priori* principles, it was impossible to derive any aid whatever from the home land, for the simple and conclusive reason that the mother kingdom was a consolidated and not a federal state. The founders of American federalism were thus driven to explore, with dim lights as compared with our own, the histories of such federal unions as had existed in Greece, and such as had grown up between the Low-Dutch communities at the mouth of the Rhine, and between the High-Dutch communities in the mountains of Switzerland and upon the plains of Germany. The meagreness of their knowledge as to Greek federalism is frankly confessed by both Madison and Hamilton, who, in speaking of the Achaian League, declare in the "Federalist" that, "could its interior structure and regular operation be ascertained, it is probable that more light would be thrown by it on the science of federal government than by any like experiment with which we are acquainted."[1] The fact is that the only federal unions with whose internal organizations the builders of our Federal Republic were really familiar, and whose histories had any practical effect on their work, were the Confederation of Swiss Cantons, the Seven United Provinces of the Netherlands, and the Germanic Confederation. The fundamental principle upon which all such fabrics rested was the requisition system, under which the federal head was simply endowed with the power, vested in a one-chamber assembly, to make requisitions for men and money upon the states or cities composing the league for federal purposes; while such states or cities, retaining the entire taxing power, alone possessed the authority to enforce them. Prior to the making of our second Federal Constitution of 1787 the modern world had never conceived of the idea of a federal union armed with the power to levy taxes in any form whatever. The first attempt made by the English states in America to construct a federal union was embodied in the first Constitution, known as the Articles of Confederation. Down to that point nothing new was achieved; the fruit of the first effort was sim-

Requisition system.

Our first Federal Constitution.

[1] No. 18, *Examples of Greek Confederacies*, is attributed to Hamilton and Madison. See Ford's *Federalist*, 108, 112. Reference is made to the work of the Abbé Mably, *Observations sur l'histoire de Grèce*, to which the writers of that day seem to have been chiefly indebted for such very imperfect knowledge as they possessed of Greek federalism.

ply a confederation on the old plan, with the entire federal power vested and confused in a one-chamber assembly, which could only deal, through the requisition system with the states, which retained the entire taxing power. In their first effort American statesmen exhibited no fertility of resource whatever in the making of a federal constitution. Federalism, which as a system of government already stood low enough in the estimation of mankind, gained nothing from an experiment that gave way in the storm and stress of a seven years' war. At its close the personality of Washington was called upon to supply the unity and cohesion our first Federal Constitution failed to afford. As Luzerne wrote of him to Vergennes, at a little later time, "More is hoped from the consideration of a single citizen than from the authority of the sovereign body." [1]

Our second Federal Constitution.

The original draft of the Articles of Confederation, made as early as the 21st of July, 1775, by Dr. Franklin and preserved in his handwriting,[2] is conclusive documentary evidence of the fact that, down to that time, even the most fertile and ingenious mind of the epoch had conceived of no advance upon the ancient type of federal government as it had existed for at least twenty-five hundred years. Certainly at the time of the making of our first Federal Constitution neither Franklin nor any other American statesman had conceived of a federal system armed with the power to tax. Twelve years later, upon the adjournment of the Federal Convention, September 17, 1787, the world was called upon to inspect an entirely new system, whose cornerstone was the independent power of taxation, coupled with machinery adequate for the enforcement of all its mandates. In the words of Tocqueville, the second Constitution was based "*upon a wholly novel theory* which may be considered a great discovery in modern political science." [3] When the masses of the American people had the opportunity to feel the practical benefits wrought in their political condition by the

"The wholly novel theory."

[1] August 4, 1783. Printed in the Appendix to Bancroft's *Hist. of the Const.*, i, 325, 326.

[2] See *Secret Journals of Congress* (*Domestic Affairs*) *21st July, 1775*, i, 283; *Madison Papers* (Gilpin ed., 1841), ii, 688. (Only the Gilpin edition will be cited.) Madison says that the plan submitted by Franklin to Congress on July 21, 1775, "though not copied into their Journals, remaining on their files in his handwriting."

[3] Cette constitution . . . repose en effet sur une théorie entièrement nouvelle, et qui doit marquer comme une grande découverte dans la science politique de nos jours."

new system, they became imbued with a sense of intense admiration; they put it upon a pedestal and made it a popular idol; as a German historian [1] has expressed it, the new Constitution soon passed through a process of canonization. In the light of these facts it is certainly a marvel that neither at the time of the invention, nor for a century thereafter, was there any real curiosity manifested as to the authorship of this "wholly novel theory" by which federalism as a system of government was suddenly transformed. If anything that may be called a theory ever existed on the subject it was nothing more definite than a vague and general assumption that, at some time during the eighty-six days the Convention was actually at work, the great invention silently, perhaps miraculously, arose out of the three plans to whose consideration the debates were confined.

Common basis of three prearranged plans.

But that theory, if such it may be called, goes to wreck the moment it is confronted by the incontestable fact that each of the plans in which the "wholly novel theory" was embodied had been carefully worked out and cast in finished literary form months before the Convention met. There were but four plans presented. That of Virginia, undoubtedly drafted by Madison; that of Charles Pinckney; that of Hamilton; and that of New Jersey drafted by Paterson, which may be entirely ignored, as it only proposed a revision of the Articles of Confederation. The two first named, by far the most important, were presented during the morning hour of May 29, the day on which the business of the Convention actually began, — with the presentation of the plans of Virginia and Charles Pinckney the proceedings were opened.[2] We know

Madison and the Virginia plan.

that for at least a year beforehand Madison was hard at work on the Virginia plan.[3] In December, 1786, we find him in active correspondence with Jefferson, then at Paris, as to the structure of that plan,[4] presented to the Convention by Gov-

[1] Von Holst, i, 64–70.

[2] *Madison Papers*, ii, 728–735.

[3] Cf. "Preparations of Madison for Labors of Federal Convention," Rives, *Life and Times of Madison*, ii, 208.

[4] Cf. Letter of Jefferson to Madison, Dec. 16, 1786, in *Jefferson's Correspondence*, by T. J. Randolph, ii, 64, 65. In that letter Jefferson suggested that, "to enable the federal head to exercise the powers given to the best advantage, *it should be organized, as the particular ones are, into legislative, executive, and judiciary.*" Pelatiah Webster had worked out that problem in great detail in his paper of Feb. 16, 1783. It was therefore an old story in 1786.

ernor Randolph, whose official dignity could give to it a weight Madison's thirty-six years could not. At the close of Randolph's presentation of the Virginia plan, Charles Pinckney, then only twenty-nine, presented his plan. The event is thus recorded in the Minutes of Yates: "Mr. C. Pinckney, a member from South Carolina, then added that he had reduced his ideas of a new government to *a system*, which he then read." From Pinckney's latest and ablest advocate, who claims that he "alone formulated a constitution before the Convention met," we learn of the painstaking care with which his "system" had been elaborated beforehand. Judge Nott tells us that "in a paper which will be called briefly 'The Observations,' written by Pinckney before he left Charleston, he sets forth at length a description of his plan of government," a task which he had, for some time in advance, "resolutely assigned to himself." [1] It is equally certain that Hamilton, then only thirty years of age, had, with even greater care, elaborated his plan beforehand. From his "Life" by his son we learn that "In the course of his speech (which occupied five hours) he read his plan of government, not the propositions which are found in the printed Journal, but 'a full plan, so prepared that it might have gone into immediate effect if it had been adopted.' This plan consisted of ten articles, each article being divided into sections." [2] The "full plan," to repeat the words of Mr. Lodge, "does not seem to have been formally introduced in the Convention, but was handed to Madison, who made a copy of it." [3] Only when Hamilton's entire plan as embodied in the two papers, equally authentic, has been examined as a whole, is it possible to understand how elaborately and deliberately he prearranged the scheme of federal government he took with him to Philadelphia. Thus we know for certain that the "wholly novel theory," as Tocqueville has labeled the great invention, passed into the Convention from the three prearranged plans drafted

Pinckney's "system."

Hamilton's "full plan."

[1] Cf. *The Mystery of the Pinckney Draught*, by ex-Chief Justice C. C. Nott (1908), 90, 189, 249, 332.

[2] *Life of Alexander Hamilton*, by John C. Hamilton, ii, 490–491.

[3] The "full plan" is printed in *The Works of Alexander Hamilton*, Lodge ed., i, 350–369. See also 347 for editor's note. Madison says Hamilton handed to him his larger plan. *Madison Papers*, iii, appendix no. 5, xvi. After making a copy of it, he returned it to Hamilton. It is hard to understand why Madison did not preserve a copy of the precious Pinckney plan, not so long as Hamilton's.

by Madison, Pinckney, and Hamilton, each of whom, while working in "the unvexed silence of a student's cell," made it the bed-rock of his performance. Into each of the three plans the five cardinal principles that constitute the invention enter as indispensable elements. The documents make it perfectly clear that the three draftsmen appropriated the "wholly novel theory" as common property, and as such made it the basis of their work. The assumption that a set of new ideas so startling, so complicated as those that constitute the great invention, should have been revealed almost at the same moment to three minds working in isolation, and far removed from each other, involves a miracle far more difficult of belief than that which tells us of the turning of water into wine.

From what common source were the plans derived?

Knowing, as the older historians should have known, that, in this as in every other case, the work of the Convention was cut out beforehand and formulated in the three prearranged "plans" or "systems," it is passing strange that no one of them ever took the pains to ask and answer the simple and inevitable question — *From what common source did the draftsmen of the prearranged plans draw the "wholly novel theory," the path-breaking idea, which was the basis of all of them?* That simple and inevitable question was never answered until a few years ago, when the author reprinted, with a commentary, the epoch-making paper published by Pelatiah Webster at Philadelphia, February 16, 1783, and there republished with notes in 1791, in which he announced to the world, *as his invention*, the entire plan of the existing Constitution of the United States, worked out in detail more than four years before the Federal Convention of 1787 met. That paper, entitled "A Dissertation on the Political Union and Constitution of the Thirteen United States of North America," whose lightest words are weighty, is just as authentic as the Constitution itself, and far more elaborate. Two editions of it, with the author's commentary, have been published by Congress. When it was thus reprinted, after an interval of one hundred and sixteen years, its contents were as unknown to the leading jurists and statesmen of this generation as if it had been a papyrus from Egypt or Herculaneum.[1] Reluctantly and ungraciously as its precious revelation has been received by many, it has swept away once

Pelatiah Webster's paper of Feb. 16, 1783.

[1] Many letters in the author's hands attest that fact.

and forever the impossible theory that the most elaborate and unique of all political inventions had no personal inventor, and the still more impossible assumption that three minds, working in isolation and far removed from each other, should have conceived, almost at the same moment, the "wholly novel theory" of federal government for which the world had been waiting for centuries. The history of no invention has ever been preserved in a more detailed, scientific, or authentic form than that announced to the world, as such, in the now famous document of February 16, 1783. Taine has said that "under every shell there was an animal, and behind every document there was a man."[1] Behind the document in question there was a man whose fame is destined to grow until it becomes greater than that of any other contributor to "modern political science."

How commerce compels unity of law.

In the evolution of constitutions things do not happen in a miraculous way,—through it all there runs the force of causation working along natural and practical lines. It was the mercantile element in the German cities that eventually crushed the spirit of feudalism; it was the mercantile element that opened the way for the Imperial Code by first creating a uniform system of commercial law. The first modern effort to give unity to law in Germany was made, as a prelude to the movement for national unity, by the general Bills of Exchange Law (*Wechselordnung*, 1848–50), while the general Commercial Code (*Gemeines Handelsgesetzbuch*), enacted in various states between 1862 and 1866, was reënacted for the new empire in 1871.[2] Just as the influence of commerce set in motion the forces that finally brought about the unity of law in Germany, so the influence of commerce set in motion the forces that finally compelled the invention of the existing Constitution of the United States. The first step was taken in January, 1786, when Virginia issued a call for a convention of states to meet at Annapolis, to "take into consideration the trade of the United States; to examine the relative situations and trade of said states; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony."[3] When Maryland prompted Vir-

Annapolis Convention.

[1] Taine, *History of English Literature*, i, 1.

[2] Cf. Bryce, *Studies in History and Jurisprudence*, 777, 778.

[3] *Madison Papers*, ii, 69.

ginia to take that step, by proposing that commissioners from all the states should meet and regulate the restrictions on commerce for the whole, the advantages of "a politico-commercial commission" for the continent were foreseen. It was New Jersey that gave a wider purpose to this trade convention by authorizing her commissioners "to consider how far a uniform system in their commercial regulations, and *other important matters*, might be necessary to the common interest and permanent harmony of the several states; and to report such an act on the subject as, when ratified by them, would enable the United States in Congress assembled effectually to provide for the exigencies of the Union." [1] Therefore in the address of the Annapolis Convention, drafted by Hamilton, it was said: "Your commissioners submit an opinion, that the idea of extending the powers of their deputies to other objects than those of commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated with that of a future convention. They are the most naturally led to this conclusion, as, in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the federal government, that to give it efficacy and to obviate questions and doubts concerning its precise nature and limits, may require a corresponding adjustment of other parts of the federal system." [2] As all the world knows, the one outcome of the Annapolis Convention was the call for a convention [3] "to meet at Philadelphia on the second Monday of the next May (1787), to consider the situation of the United States, and devise such further provisions as should appear necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report to Congress such an act as, when agreed to by them and confirmed by the legislatures of every state, would effectually provide for the same." [3]

Address prepared by Hamilton.

Madison has thus recorded the fact that *six years before* that time, Pelatiah Webster had proposed the calling of such a convention: "In a pamphlet published in May, 1781, at the seat of

Federal Convention first proposed by Webster in 1781.

[1] Elliot, i, 117, 118.
[2] *Madison Papers*, ii, 700, 701.
[3] Elliot, i, 117–120.

Congress, Pelatiah Webster, an able though not conspicuous citizen, after discussing the fiscal system of the United States, and suggesting, among other remedial provisions, one including a national bank," was the first to indicate "the necessity of their calling a *Continental Convention* for the express purpose of ascertaining, defining, enlarging, and limiting, the duties and powers of their Constitution."[1] In the notes to his great paper of February 16, 1783, Webster tells us in express terms that from the outset he "was fully of opinion (though the sentiment at that time would not very well bear) that it would be ten times easier to form a new Constitution than to mend the old one."

This daring innovator, who was the first to understand the necessity of an entirely new federal fabric, was born at Lebanon, Connecticut, in 1726, and graduated at Yale College in 1746. In 1755 he moved to Philadelphia, where he became a prosperous merchant, meeting with such success as to earn ample leisure for study and writing. During the British occupation of the city in February, 1778, on account of his ardor in the patriot cause, he was arrested at night, probably by order of General Howe, and closely confined in the city prison for over four months, a large part of his property being confiscated to the King's stores. As early as October, 1776, he had begun to write on the currency, strenuously urging upon Congress the levying of a tax to provide means to raise the debt incurred by the heavy issuance of the bills of credit commonly known as "Continental Currency." Three years later he began the publication of the famous series of "Essays on Free Trade and Finance," of which seven numbers were issued in 1785. In the next year appeared "An Essay on Credit. Reasons for Repealing the Act of the Legislature,

His essays on trade and finance.

[1] *Madison Papers*, ii, 706, 707. No attention should be paid to Bancroft's vain attempt to discredit Madison's statement. *History of the Constitution*, i, 24, note 3. Apart from Madison's great accuracy and Bancroft's well-known inaccuracy stands the fact that the call of 1781 was a natural part of Pelatiah Webster's initiative as now understood. Madison was on the ground and knew the facts; Bancroft's inference is based on flimsy hearsay nearly a century after the event. Bancroft never grasped the importance of Webster's work. Alexander Johnston, in his *American Political History*, 70, says: "In May, 1781, the first public proposal of this means of revisal ["by a convention of all the states"] was made by Pelatiah Webster in a pamphlet."

Revoking the Charter of the Bank of North America." Finally, in 1791, he republished his various papers in a work entitled "Political Essays on the Nature and Operation of Money, Public Finances, and other Subjects Published during the American War, and Continued up to the Present Year." [1] That volume, which displays a marvelous mastery of the subject to which it is devoted, continues as the leading authority upon the finances of that period. In weighing Madison's statement that Pelatiah Webster, though an able was not a "conspicuous" citizen, we must take into account not only the extent and importance of his intellectual work, but also the fact that, as a political economist, he was consulted by Congress as to the resources of the country. Another evidence of his position as a public man is to be found in the fact that when in July, 1782, a petition was to be presented to Congress in behalf of "the deranged officers of the lines of Massachusetts and Connecticut," he, a native of the state last named, was appealed to for his influence. In a petition drawn in the noblest style, and signed "Pelatiah Webster, William Judd," he presented the case, which was finally referred to a special committee composed of Mr. Peters, Mr. Hamilton, and Mr. Dyer. The report,[2] which survives in the handwriting of Alexander Hamilton, is dated March 6, 1783, just eighteen days after the publication of the great paper of February 16 of that year. Thus the fact is fixed that as a public man Webster was as well known to Hamilton as he was to Madison.

His contact with Congress.

His fitness to deal with the problem of problems.

This successful merchant, ardent patriot, trained financier, and recognized expounder of the science of political economy, was better equipped perhaps than any man of his time to deal with the problem of problems which then so sharply confronted the country. As he viewed it, that problem was in its essence financial and commercial. Approaching it on its financial side, he set for himself the task of constructing an entirely

[1] The second edition of 1791 was "Printed and sold by Joseph Crukshank, No. 91 High Street," Philadelphia.

[2] It begins: "The Committee to whom was committed the report of the Grand Committee on the memorial of Pelatiah Webster and William Judd in behalf of the deranged officers of the lines of Massachusetts and Connecticut submit the following resolution," which was one of approval. *MS. Records of the Continental Congress*, no. 19, vol. 6, folios 489–493. It is sad indeed that Congress has not yet provided for the printing of these records.

new federal fabric to be endowed, for the first time in the world's history, with the independent power of taxation. To use his own words: "I begin with my first and great principle, viz.: That the Constitution must vest powers in every department sufficient to secure and make effectual the ends of it. . . . They must therefore of necessity be vested with the power of taxation. I know this is a most important and weighty truth, a dreadful engine of oppression, tyranny, and injury when ill used; yet, from the necessity of the case, it must be admitted. . . . To make all these payments dependent on the votes of thirteen popular assemblies . . . is absurd. This tax can be laid by the supreme authority much more conveniently than by the particular assemblies, and would in no case be subject to their repeal or modifications." In that fundamental concept was embodied the path-breaking idea (*bahnbrechende Idee*) that wrought the revolution. From the conception of a federal government with independent taxing power resulted, as an inevitable corollary, the idea of a strictly organized government, armed with the power to execute its own mandates. With a lucidity and terseness never exceeded by Marshall in restating his formulas, Webster said: "No laws of any state whatever, which do not carry in them a force which extends to their effectual and final execution, can afford a certain or sufficient security to the subject: this is too plain to need any proof. Laws or ordinances of any kind (especially of august bodies of high dignity and consequence) which fail of execution are much worse than none; they weaken the government; expose it to contempt; destroy the confidence of all men, natives and foreigners, in it." In order to endow his unique federal creation with the power thus to execute its own laws, he proposes that it should be divided, as the state governments are, into three departments, executive, legislative, and judicial, the organization of each of which he worked out in great detail. Thus for the first time in history, the great architect proposed (1) a federal government with the independent power of taxation; (2) the division of the federal head into three departments, legislative, executive, and judicial; (3) the division of the federal legislature into two chambers; (4) a federal government with delegated powers, the residuum of power remaining in the states. The fourth proposition Webster stated in this remark-

Inventor of federal taxation.

Supremacy of federal law a corollary.

His four novel and basic principles.

ably ample and explicit form as an anticipation of the Tenth Amendment, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." "I propose further," said Webster, "that the powers of Congress, and all the other departments, acting under them, shall all be restricted to such matters only of general necessity and utility to all the states, as cannot come within the jurisdiction of any particular state, or to which the authority of any particular state is not competent: so that each particular state shall enjoy all the sovereignty and supreme authority to all intents and purposes, excepting only those high authorities and powers by them delegated to Congress, for the purposes of the general Union." The discovery of these four basic principles, of which the world had never heard before, wrought a revolution whose essence is embodied in the fact that the new creation, partly federal and partly national, operates directly on the citizen and not on the states as corporations. As Tocqueville has expressed it: "Here the term federal government is clearly no longer applicable to a state of things which must be styled an incomplete national government (*un gouvernement national incomplet*): a form of government has been found out which is neither exactly national nor federal; but no further progress has been made, and the new word which will one day designate this novel invention does not exist." [1]

His effort to regulate trade between the states.

Approaching his fundamental concept from the commercial side, Webster manifested an almost supernormal prescience as to future conditions, so far as they involved the need for uniformity of law in general and uniformity of congressional legislation affecting trade between the states in particular. "Merchants," he said, "must from the nature of their business certainly understand the interests and resources of the country the best of any men in it. . . . I therefore humbly propose, if the merchants in the several states are disposed to send delegates from their body, to meet and attend the sitting of Congress, that they shall be permitted to form a chamber of commerce, and their advice to Congress be demanded and

[1] Tocqueville was keenly conscious of the fact that a great discovery (*une grande découverte*) had been made, but the documentary evidence as to its real author was never accessible to him.

admitted concerning all bills before Congress, *as far as the same may affect the trade of the states.* Besides the benefits which Congress may receive from the institution, a chamber of commerce, composed of members from all trading towns in the states, if properly instituted and conducted, will prove very many, I might almost say innumerable advantages of singular utility to all the states. It will give dignity, *uniformity*, and safety to our trade." That recommendation was the only basic part of the plan of February 16, 1783, which the Convention of 1787 failed to adopt. But a century later the wisdom and foresight of its author were fully vindicated in that respect by the creation of the Department of Commerce and Labor, which is now performing, in a general way, the functions which were to have been performed by the chamber of commerce in the original plan.[1] Thus it appears that the first modern effort to give unity to law in Germany was made by the merchant class as a prelude to the movement for national unity; thus it appears that the Annapolis Convention, called to establish a uniform commercial system, widened into the Federal Convention of 1787; thus it appears that the "wholly novel theory" of federal government which was embodied in the work of that immortal assembly was the invention of a Philadelphia merchant and political economist, whose plan rested on two fundamental concepts — a uniform and self-executing system of federal taxation, and a uniform commercial system, that would give "dignity, *uniformity*, and safety to our trade." Just as it has been said by a world-famous jurist that the merchant was "the father of the civil code of Germany," [2] so it may be said that a merchant was the father of the existing Constitution of the United States. The exigencies of the times demanded the invention; a genius with special aptitude and training for the task was at hand; and he performed it with a perfect understanding of the magnitude of his achievement. Who can doubt that fact after feeling the glow of intellectual ecstasy with which he concludes this luminous statement: "But now the

Foreshadows Department of Commerce and Labor.

Exigencies of the times demanded the invention.

[1] President Roosevelt, in addressing at the White House a delegation headed by Mr. Straus, then Secretary of Commerce and Labor, commented with great emphasis upon this feature of Pelatiah Webster's plan.

[2] See Dr. Rudolph Sohm's article on the general theory and purpose of the code in *The Forum*, October, 1899.

great and most difficult part of this weighty subject remains to be considered, viz.: how these supreme powers are to be constituted in such manner that they may be able to exercise with full force and effect the vast authorities committed to them for the good and well-being of the United States, and yet so checked and restrained from exercising them to the injury and ruin of the states, that we may with safety trust them with a commission of such vast magnitude — and may Almighty Wisdom direct my pen in this arduous discussion." In such brilliant and comprehensive statements we have photographed for us the workings of a mind moving along paths never trod before.

History of the records of the Federal Convention.

Naturally there are those who desire to know why it was, with such authentic and explicit documentary evidence available, the world was not informed as to the real history of the authorship of the great invention from the very beginning. In the first place, it must be remembered that whenever a great intellectual performance takes place a certain time must elapse before its length, breadth, and depth can be correctly estimated. A long time passed by before even Shakespeare was permitted to enter into the full possession of his kingdom. In the second place, it must be remembered that the proceedings of the Federal Convention were shrouded in the profoundest secrecy, whose seal was not broken, even in part, until after the lapse of thirty-one years. Another period of twenty-three years had then to pass by before the most elaborate and decisive of all the memorials was finally given to the world. In order to keep its secrets the Convention, before final adjournment, directed its secretary to deposit "the Journal and other papers of the Convention in the hands of the President"; and in answer to an inquiry from him it was resolved that Washington "retain the Journal and other papers subject to the order of Congress, if ever formed under the Constitution."[1] Not until 1818 was the seal of secrecy upon the official record broken when Congress by a joint resolution directed the publication of the "Journal . . . and all acts and proceedings" of the Convention then in possession of the Government. Whatever was revealed

Seal of secrecy partially broken in 1818.

[1] *Documentary History of the Constitution*, iii, 769–770. "Mr. King suggested that the Journals be either destroyed or deposited in the custody of the President," p. 769.

between 1787 and 1818, generally under political pressure, was of a clandestine character. In that way Hamilton's sketch of a plan of government, unjustly represented as monarchical, submitted by him June 18, 1787, was printed as early as 1801, "with a view of destroying his popularity and influence." [1] John Quincy Adams, then Secretary of State, directed the printing at Boston in 1819 of the "Journal, Acts and Proceedings of the Convention . . . which formed the Constitution of the United States." [2] Among the many difficulties he encountered perhaps the gravest was that arising from the fact that Charles Pinckney's plan, offered on May 29, 1787, just after the Virginia plan, did not appear in the record. Thus it became necessary for Adams to call upon Pinckney for a copy of the lost plan thirty-two years after its presentation to the Convention. In complying with that request, Pinckney stated to the Secretary of State that "it is impossible for me now to say which of the 4 or 5 draughts I have is the one. But enclosed I send you the one I believe was it." [3] The copy so furnished has for a long time been regarded as spurious, to a certain extent at least, largely because of a guarded yet hostile criticism made upon it after Pinckney's death, by Madison, who begins by saying that "*the length of the document laid before the Convention*, and other circumstances, having prevented the taking of a copy at the time," [4] etc. Thus we have the fact fixed by the highest authority that the plan presented by Pinckney, reducing "his ideas of a new government to a system," was so elaborate that its "length" was one of the causes that prevented the making of a copy of it. There can be no doubt that Pinckney's "system" was as elaborately worked out as Hamilton's "full plan, so prepared that it might have gone into immediate effect if it had been adopted." Only Pinckney and Hamilton formulated, before the Convention met, finished schemes of a new system of federal government; the Virginia Resolutions did not embody what may be called a plan; they only set forth the basic principles upon which a new federal system might be constructed; they only "brought before the

Pinckney's plan not in the record.

Why it was not copied.

[1] See Jameson, *Studies*, p. 148.

[2] The Journal was reprinted in 1830 as volume iv of the first edition of Elliot's *Debates*. See Max Farrand's "The Records of the Federal Convention" in the *Am. Hist. Review*, xiii, no. 1, Oct., 1907.

[3] J. Q. Adams, *Memoirs*, iv, 365.

[4] *Madison Papers*, iii, Appendix no. 2, v. See also p. 735.

Convention questions for abstract discussion and bases on which to rest principles of government."[1] Pinckney himself stated the matter with perfect accuracy when in writing to John Quincy Adams, December 12, 1818, he said: "The draught of the Constitution proposed by me was divided into a number of articles and was in complete detail — the resolutions offered by Mr. Randolph were merely general ones, and as far as I recollect they were both referred to the same committee."[2] And here let the fact be emphasized that, in the words of a recent investigator, "there exist four different texts of these resolutions, and what is more remarkable, it can (in the view of the present writer) be proved that no one of the four is the exact text of the original series which Governor Randolph laid before the Convention on May 29, 1787."[3] Thus it appears that the exact text of the Virginia Resolutions as well as that of the Pinckney plan is a matter of controversy. Fortunately for the fame of Pinckney, two distinguished specialists, citizens of New England, have recently undertaken to defend his memory; and the outcome has been a very important contribution to the history of what occurred within the Committee of Detail. That outcome is so important that its essence will be restated within a narrow compass, as it has been of great value to the author in dealing with the authorship of the Constitution as a whole. The Virginia Resolutions and the Pinckney plan, offered together on May 29, were at once referred to a Committee of the Whole; and, after a discussion that continued until June 13, it reported to the House the resolutions as it had amended and agreed upon them. Finally on July 26, the twenty-three resolutions, as the Convention had formulated them, were referred to the Committee of Detail, and "with the above resolutions were referred the propositions offered by Mr. C. Pinckney on the twenty-ninth of May, and by Mr. Paterson on the fifteenth of June."[4] The Committee of Detail consisted of Rutledge, Randolph, Gorham, Ellsworth, and James Wilson.[5] As

Pinckney defended by Jameson and Nott.

His plan submitted to Committee of Detail.

[1] *The Mystery of the Pinckney Draught*, 264.

[2] *Writings of James Madison*, iii, 22.

[3] Jameson, "Studies in the History of the Federal Convention of 1787," pp. 103–104, *Annual Report of Am. Hist. Association.*

[4] *Madison Papers*, ii, 1225–1226.

[5] The duty of that committee was "to prepare and report a con-

the last named was the dominating mind of the committee, it is not strange that he should have recorded what occurred as to the use made of the Pinckney plan or "system," which was certainly more concrete and more elaborate than anything else with which the committee was called upon to deal. A few years ago the mystery was solved by the finding, among the Wilson manuscripts in the library of the Historical Society of Pennsylvania, of an outline of the genuine Pinckney plan, by Professor Jameson,[1] who says: "There came to the writer a manuscript containing large portions of the original text of the long lost Pinckney plan.

New testimony from Wilson manuscripts.

> "Then felt I like some watcher of the skies
> When a new planet swings into his ken."

From a critical examination subsequently made, it appears that "the portion of the plan which Professor Jameson discovered contains not less than twenty propositions that are found in the report of the Committee of Detail and that are not in the twenty-three resolutions submitted to the committee, nor in the Virginia or Paterson resolutions. . . . By the help of the condensation of the plan which Professor Jameson discovered, and from the light thrown on the problem by the document printed below, we can say that Pinckney suggested some thirty-one or thirty-two provisions which were finally embodied in the Constitution; . . . it must not be assumed that we know all that Pinckney thus contributed to the fabric of the Constitution; . . . if mere assertion based on analogy and general probability were worth while, other portions of the Constitution might be pointed to as coming from the ingenious and confident young statesman from South Carolina." [2] Thus, through the unearthing of a priceless document ("no documents, no history"), Bancroft's foundationless assertion that "no part of it [the Pinckney plan] was used" [3] by the Convention has been destroyed; and in the same way Meigs's assertion, that "the Virginia plan became the bed-rock of the Constitution," has been entirely undermined.[4] The fact is, strictly

stitution," and the Convention adjourned until August 6, so that the Committee might have time to prepare and report the Constitution.

[1] *Studies*, 128.

[2] *American Historical Review*, ix, July, 739–741.

[3] *History of the Constitution*, ii, 14.

[4] *The Growth of the Constitution*, 17.

Pinckney presented only real plan.

speaking, there was no Virginia plan; the Virginia Resolutions presented only "questions for abstract discussion and bases on which to rest principles of government." The only plan or "system" actually presented to the Convention was that of Charles Pinckney, which, as the documentary evidence now available shows, was very largely used by the Committee of Detail in preparing their draft of the Constitution submitted to the Convention on August 6. In accounting for the loss of the original text of the Pinckney plan, it is hard to resist Judge Nott when he says: "Judging in the light of the facts which the case discloses, we must conclude that the only thing which would have justified the Committee of Detail in not returning the Pinckney draught to the secretary of the Convention was that it had been destroyed; the only thing which would have justified the committee in destroying it was that they were compelled to use it as printer's copy." [1] How otherwise could it have escaped the vigilant Madison, who preserved a copy of everything else? No matter if the exact text of the Virginia Resolutions and the Pinckney plan have been lost; it is certain that we possess the substance of both; and it is equally certain that from the latter a large part of the details of the Constitution were drawn. "If we discard the draught — the original draught, the disputed draught, and the draught described in the 'Observations,' the fact will remain that Pinckney was an important contributor to the work of framing the Constitution." [2]

Its influence on the Constitution.

Unofficial records.

As public men of that day were accustomed to do their own reporting, it is not strange that many members of the secret conclave — notably Madison, Luther Martin, Yates, Pierce, Pinckney, Paterson, Hamilton, McHenry, and Mason — made notes of the proceedings for their own use and protection. Certainly theirs was a fortunate precaution, as the official secretary, either through incompetency or neglect, kept what, according to Adams, "were no better than the daily minutes from which the regular journal ought to have been, but never was made out." [3] That vacuum was never filled until "The

[1] *The Mystery of the Pinckney Draught*, 241.

[2] Ibid. 261.

[3] J. Q. Adams, *Memoirs*, iv, 385. For letters concerning his appointment, see *Doc. Hist. of the Constitution*, iv, 121–122, 169; and also Rowland, *Life of George Mason*, ii, 102.

Papers of James Madison," who died in 1836, were purchased by Congress and published in three volumes under the editorship of Gilpin in 1841. All other records at once paled into insignificance in the presence of this invaluable storehouse, more than one half of which is made up of notes of the debates of the Convention. In his preface to the " Debates," Madison says: "I chose a seat in front of the presiding member, with the other members on my right and left hand. In this favorable position for hearing all that passed, I noted in terms legible and in abbreviations and marks intelligible to myself what was read from the chair or spoken by the members; and losing not a moment unnecessarily between the adjournment and reassembling of the Convention, I was enabled to write out my daily notes during the session or within a few finishing days after its close." [1] Thus it appears that the record, as made up by the semi-official reporter, to whom many of the members supplied copies of their speeches and motions, and which has become the standard authority, was not published until fifty-four years after the Convention closed. Just at that moment, when a critical examination of the entire proceedings was, for the first time, made possible, the approaching storm of civil war suspended such inquiries until Bancroft broke the long silence by publishing in 1882, when he was quite an old man, his "History of the Formation of the Constitution of the United States of America." While that first attempt to write the history of the Federal Convention has undoubted merit, its many glaring inaccuracies and deficiencies admonish us that it was the mere beginning, not the end of an inquiry. As an illustration, reference may be made to Bancroft's cardinal contention that the work of the Convention rested on five plans: (1) the Virginia plan; (2) the Connecticut plan; (3) the Charles Pinckney plan; (4) the New Jersey plan; (5) the Hamilton plan. After pluming himself in his preface on account of the supposed discovery of a paper containing the so-called Connecticut plan, he says in the body of the work: "The project which in importance stands next to that of Virginia is the series of propositions of Connecticut. It consisted of nine sections, and in the sessions of the Convention received the support of the Connecticut delegation, particularly of Sherman

The Madison Papers, 1841.

Entire record not published for fifty-four years.

Bancroft's so-called Connecticut plan.

[1] *Madison Papers*, ii, 716; *Doc. Hist.*, iii, 7960.

and Ellsworth. It was framed while they were still contriving amendments of the Articles of Confederation . . . therefore, certainly before the 19th of June, and probably soon after the arrival of Sherman in Philadelphia." [1] For a quarter of a century that utterly foundationless story passed as authentic history, until the author, in searching the records of the Convention for a copy of the so-called Connecticut plan, discovered that no such plan was ever presented at the time alleged or at any other time. The whole story, so far as the Federal Convention is concerned, is a pure myth that existed only in Bancroft's imagination. The facts are that the series of propositions in question were drawn years before by Roger Sherman while he was a member of the Continental Congress, as amendments then to be proposed to the Articles of Confederation. But he never offered them either in the Continental Congress or in the Federal Convention; they were simply unused memoranda found among Sherman's papers after his death by his executors.[2]

Conditions at the time of Webster's discovery.

From what has now been said it appears that the work of the Convention really rested on four plans, and from that number must be deducted the New Jersey plan, which, as it simply proposed a revision of the Articles of Confederation, is of no importance whatever so far as the passing into the Convention of the invention of February 16, 1783, is concerned. In simple yet emphatic terms Pelatiah Webster has thus explained the circumstances under which that invention was made. He says: "At the time this Dissertation was written [Feb. 16, 1783] the defects and insufficiency of the old Federal Constitution were universally felt and acknowledged; it was manifest, not only that the internal policy, justice, security, and peace of the states could never be preserved under it, but the finances and public credit would necessarily become so embarrassed, precarious, and void of support, that no public movement, which depended on the revenue, could be managed with any effectual certainty: *but though the public mind was under full conviction of*

[1] *Hist. of the Constitution*, ii, 36–37, and note 1.

[2] See "Life of Roger Sherman" by Jeremiah Evarts, in *Biography of the Signers*, ed. of 1828, pp. 42 *seq.*; *Life of Sherman*, by Boutelle, 132–134.

The author has dealt with the whole subject at length in the *Yale Law Review* for December, 1908, in an article entitled "A Bancroftian Invention."

*all these mischiefs, and was contemplating a remedy, yet the public ideas were not at all concentrated, much less arranged into any new system or form of government which would obviate these evils.* Under these circumstances I offered this Dissertation to the public. How far the principles were adopted or rejected in the new Constitution, which was four years afterwards [Sept. 17, 1787] formed by the General Convention, and since ratified by the states, is obvious to every one." The italicized portion of that statement is supported by the entire body of contemporary history. At that early day, four years and three months before the meeting of the Convention, there is no trace or suggestion of any other plan or project of a new Constitution that can be placed in rivalry or contrast with Webster's plan. Thus the great architect stands alone and isolated from all rivals in the solitude of his own originality.[1] Of that all-important fact we have incontestable evidence furnished by Madison himself. In his "Introduction to the Debates in the Convention" he says: "As a sketch on paper, the earliest, perhaps, of a constitutional government for the Union (organized into regular departments, with physical means operating on individuals), to be sanctioned by the people of the states, acting in their original and sovereign character, was contained in the letters of James Madison to Thomas Jefferson, of the nineteenth of March; to Governor Randolph of the eighth of April; and to General Washington of the sixteenth of April, 1787, for which see their respective dates." [2] That statement should close the controversy as to authorship, so far as Madison is concerned, as he frankly admits that he never made a "sketch on paper" earlier than March and April, 1787. More than four years before that time, Pelatiah Webster, then in his fifty-ninth year, had given to the world his finished sketch, of more than thirty octavo pages, in which he had worked out in detail "a constitutional government for the Union (organized into regular departments, with physical means operating on individuals), to be sanctioned by the people of the states, acting

No trace of any other plan at that time.

Madison's first "sketch on paper," March and April, 1787.

[1] In the winter of 1784–85 Noah Webster, then a young man of twenty-six, republished at Hartford, in a pamphlet, entitled *Sketches of American Policy*, the substance of Pelatiah Webster's paper of Feb. 16, 1783, without material additions. Daniel Webster, Noah Webster, and Pelatiah Webster were all of the same stock.

[2] *Madison Papers*, ii, 714. See also 622, 630.

in their original and sovereign character" — a government with the independent power of taxation, with a bicameral federal legislature, and with a federal judiciary supreme within its jurisdiction. Before the world had ever heard of anything but a one-chamber federal assembly he said, "That Congress shall consist of two chambers, an upper and a lower house, or Senate and Commons, with the concurrence of both necessary to every act." As the elaborate and formal paper announcing the great invention was published and spread broadcast at Philadelphia, then "the seat of Congress," on February 16, 1783,[1] certainly all the world must have been familiar with its contents when the Federal Convention met in that city on May 25, 1787. During the interval of four years and three months, Madison, Hamilton, and Pinckney were all members of the Congress of the Confederation. Madison took his seat in that body at Philadelphia, March 20, 1780, and was actually present in that city, as his letters show, on February 16, 1783. That he was personally familiar with Pelatiah Webster and his work we know from his statement, heretofore quoted, to the effect that "in a pamphlet published in May, 1781, at the seat of Congress," Webster had been the first to suggest the calling of a "Continental Convention" charged with the duty of making a new Constitution. Hamilton found Madison at Philadelphia when he took his seat in Congress, November 25, 1782; he continued to be a member of that body until October, 1783; and, as the record shows, he was actually present in that city, February 16, 1783. Charles Pinckney was a member of Congress from 1784 to 1787.

Webster's paper spread broadcast, Feb. 16, 1783.

Hamilton and Madison then in Philadelphia.

Only the blind or infatuated will contend that these vigilant and ambitious young statesmen, intent upon improving conditions then crying out for a remedy, did not read and master the contents of the great document, the first to propose the construction of a new federal system, published "at the seat of government," under their very eyes, by Pelatiah Webster on February 16, 1783. Certainly this ripe financier and trained political economist of fifty-seven was far better equipped to

Effects of Webster's initiative.

[1] On the title-page this appears: "Philadelphia. Printed and sold by T. Bradford, in Front Street, three Doors below the Coffee House. MDCCLXXXIII." As originally printed, it covered 47 pages, 12mo, and is dated "Philadelphia, February 16, 1783." An original copy is to be seen in the Library of Congress.

solve a problem, in its essence financial and commercial, than either Madison, Pinckney, or Hamilton could have been at that time. The relation that existed between the mature man of contemplation and the younger men of action was just what it should have been. He formulated, in the light of his experience, the novel principles which they were to translate into a working system of government. The effect of Webster's initiative on Hamilton was almost instantaneous. On April 1, 1783, just six weeks after the publication of the great document, Hamilton expressed in Congress, for the first time, his desire "to see a general convention take place, and that he would soon, in pursuance of instructions from his constituents, propose to Congress a plan for that purpose; the object would be to strengthen the Federal Constitution." [1] On April 18 [2] Congress was likewise impelled to move in the direction of a stronger government by appealing to the states for power to levy specific duties on certain enumerated articles, and five per cent on others. On April 28, and, as Bancroft admits, "so far as the records show never till then," [3] Congress appointed a committee on pending resolutions in favor of a general convention. A few months later, Robert Morris, the financier of the Revolution, resigned, "rather than be the minister of injustice," hoping thus to force upon the states the necessity of granting taxing power to Congress.[4] The great innovator was thus able, by his pen, to drive the men at the wheel to take official action designed to bring about the calling of the "Continental Convention" he had been the first to propose as early as 1781; and at the same time to warn the states that they must arm Congress with taxing power, which was his basic contention.

Hamilton's motion of April 1, 1783.

Congressional action, April 18 and 28.

Motive of Morris's resignation.

No critical mind should be tempted to confuse the sphere that belongs to the architect, who made the great advance in modern political science by inventing, in 1783, an entirely new plan of federal government, with the sphere that belongs

Difference between architect and master builders.

[1] *Madison Papers*, i, 429, 430; Elliot, 81.

[2] *Public Journals of Congress*, 17th and 18th of April, 1783, iv, 262, 265.

[3] *Hist. of the Const.*, i, 105.

[4] In June, 1783, Washington addressed a last circular to the governor of every state urging the necessity of granting to Congress some power to provide a national revenue. The date of the circular varies with the time of its emission. *Sparks*, viii, 439.

to the practical statesmen who, in 1787, seized upon that plan and transformed it into a working system. To each achievement, entirely distinct from the other, belongs the reward of immortality. As the history of each is documentary there is no excuse for confusing the one with the other. In its last analysis the problem involves simply a comparison of four documents which are printed side by side in the Appendix. When their contents have been studied and compared, no one should fail to perceive that the invention as defined in the parent document of February 16, 1783, was simply restated, with large variations of detail, in the three "plans" completed by Madison, Pinckney, and Hamilton a short time before the meeting of the Federal Convention in May, 1787. Despite the fact that Madison says, in his letters of March and April, 1787, that he was the first to complete "a sketch on paper," it is more than likely that the far more elaborate sketches embodied in the plans of Pinckney and Hamilton were completed at or before that time. And here let it be said, to the honor of each of the draftsmen of the three plans, that no one of them ever claimed to be the author or inventor of the "wholly novel theory" appropriated by all as common property. If they failed in any duty it was in the negative one of declaring at the time that their work was based on a preëxisting invention to which no one of them made any personal claim whatever. Such a claim upon the part of either would have put them at war with each other, a conflict that never existed. So long as we look to the documents for history, we proceed, according to the ordinary rules of common sense, to trace three reproductions, identical in all vital particulars, to a common source. The moment the normal and obvious conclusion thus reached is rejected, nothing remains but the impossible assumption that, in some miraculous way, the new plan was revealed, during a comparatively few months preceding the meeting of the Convention, to three youthful statesmen working in isolation and far removed from each other, no one of whom ever claimed to be the author of it. When Tocqueville declared that the "wholly novel theory" was "a great discovery in modern political science," when Gladstone declared that the new Constitution, whose excellence depends entirely upon that theory, was "the most wonderful work ever struck off at a given time by the brain and the pur-

No draftsman claimed to be inventor.

pose of man," neither attempted to particularize by indicating that the novel and path-breaking idea originated with one man, who, at a given time, solemnly submitted it to the world as his invention. The document that fixes that fact was not accessible to either. If it had been, could either have hesitated to conclude that in this case, as in all others, a radically new and complicated invention must have had a personal inventor specially qualified by genius and special study for the achievement? The entire history of inventions repels the idea that such an intellectual performance is ever a corporate act arising impersonally out of the brains of many; it is always, in its inception, the personal product of the brain of a particular man specially qualified by nature for the task. In this case the marvel is in the perfection with which the inventor worked out his ideas in the first instance, and then elaborated them in formulas as terse and lucid as any ever constructed by Bacon or Burke.

An invention implies a personal inventor.

And yet after all has been said, the fact remains that the master builders, who transformed under the most difficult circumstances possible the dream of the great architect into a working system of government, achieved a result just as remarkable as the invention itself. The philosophers, statesmen, jurists, warriors, experienced men of affairs, who composed the august assembly that wrought at Philadelphia in 1787, may be compared, as to genius and learning, with the master spirits of any age.[1] As colleagues of the peerless Washington, who had himself drawn in advance three new constitutions, each of which aimed at making a stronger and more perfect union,[2] Virginia sent her governor, Edmund Randolph, who afterwards served as Attorney-General and Secretary of State; James Madison, the draftsman of the Virginia plan and the semi-official reporter of the Convention; George Mason, who had drafted Virginia's incomparable bill of rights;[3] and George Wythe, the great law teacher at William and Mary

Work of the master builders.

Randolph.

Madison.

Mason.

Wythe.

[1] On hearing who were its members, Jefferson wrote to one correspondent that "the Federal Convention is really an assembly of demigods." *Works*, ii, 260.

[2] See *North American Review*, xxv, 263.

[3] He was the first to express, *in a dogmatic form*, in that instrument the principle "that the legislative and executive powers of the state should be separate and distinct from the judiciary."

College and chancellor from 1778 until 1798, who was one of the very first to assert the power of the judiciary to put the stamp of nullity on an unconstitutional law.[1] From Pennsylvania came the inspired printer Franklin, the philosopher, statesman, and diplomatist who had drafted the Articles of Confederation; James Wilson, the profound Scotchman trained at the University of Edinburgh, whose prophetic eye foresaw and whose lips foretold all that was to come; the bitter-tongued Gouverneur Morris, who did more than any other to give to the Constitution its final form; and Robert Morris, the bold and self-sacrificing financier of the Revolution, who drew so freely upon his own purse, and who resigned his office "rather than be the minister of injustice." From Massachusetts came Rufus King, a Harvard graduate, who was afterwards Senator from New York and Minister to Great Britain from 1796 to 1803; Elbridge Gerry, also a Harvard graduate and a member of both the old and new Congress, who was elected Vice-President in 1812, dying in office. From New York came Alexander Hamilton, the draftsman of perhaps the most elaborate scheme of government taken to the Convention, whose brilliant career as an author of "The Federalist" and dominant statesman during Washington's administration has fixed his fame for all time. From South Carolina came Charles Pinckney, who, at twenty-nine, drafted the "system" which, despite the loss of the original text, is surely destined to be recognized as one of the most potent forces in shaping the proceedings that followed its presentation; Charles Cotesworth Pinckney, his kinsman, who was educated at Oxford and the Middle Temple, served with distinction in the Revolutionary Army, was one of the envoys to France in 1797, and the Federalist candidate for the Presidency in 1804 and 1808; John Rutledge, who studied law in London at the Temple, served in the Continental Congress, was governor of his state from 1779 to 1782, and finally Chief Justice of the United States; and the gifted Pierce Butler, who, underestimating "the dynamic energy of freedom in producing wealth, and attracting and employing and retaining population," [2] vainly

Franklin.

Wilson.

Morrises.

King.

Gerry.

Hamilton.

Pinckneys.

Rutledge.

Butler.

[1] See his judgment in *Com.* v. *Caton*, 4 Call (Va.) 5–21. In the latter part of his life he emancipated his slaves.

[2] Bancroft, *History of the Formation of the Constitution of the United States*, ii, 87.

dreamed that swarms of emigrants were about to throng every path to the Southwest. "North Carolina, South Carolina, and Georgia," he said, "will have relatively many more people than they now have. The people and strength of America are evidently bearing to the South and Southwest." [1] From Connecticut came Oliver Ellsworth, a graduate of Princeton, and Chief Justice of the United States from 1796 to 1800, whose great title to fame rests upon the fact that he drafted the Judiciary Act of 1789, which "may be said to reflect the views of the founders of the Republic as to the proper relations between the federal and state courts"; [2] and Roger Sherman, who rose from the bench of a shoemaker, first to a high place at the bar and then to the Senate of the United States. From New Jersey came William Paterson, the draftsman of the plan that rested upon the idea that the proper object of the Convention was a mere revision and extension of the Articles of Confederation. From North Carolina came Alexander Martin, William R. Davie, Richard Dobbs Spaight, and Hugh Williamson, who, at the critical moment, prevented a catastrophe and saved the Convention from dissolution. When the Connecticut compromise — which proposed that the new Congress should be made up of two houses, one representing the states in proportion to their population, the other giving an equal vote to each state — was trembling in the balance, North Carolina saved the Convention by deserting her larger associates, thereby giving a majority of one to the smaller states. In the midst of that crisis it was that Franklin, forgetting the mocking skepticism of his youth, proposed that the Convention should be opened every morning with prayer.[3] No assembly so small — it numbered only fifty-five delegates — was ever dominated by so many men of the highest order. They need not strut in borrowed plumes; they need no fame that belongs to another. The most ardent worshiper of the master builders would only belittle their immortality if he fancied that it could be at all dimmed by the rendition of tardy justice to the great architect, the man of

Ellsworth.

Sherman.

Paterson.

Martin, Davie, Spaight, Williamson.

Need no fame not their own.

[1] *Madison Papers*, iii, 1091–1093; Elliot, 308, 309.

[2] Mr. Justice Field in Virginia *v.* Rives, 100 U. S. 338.

[3] "I have lived, sir, a long time, and the longer I live the more convincing proofs I see of this truth — that God governs in the affairs of men." *Madison Papers*, ii, 985.

contemplation, who was their natural, perhaps their necessary forerunner.

Personal conduct of Pelatiah Webster.

When we contemplate the personal conduct of Pelatiah Webster, in the midst of what must have been one of the most trying ordeals through which a creative intellect ever passed, every generous mind must be touched by his steadfast hope for the future, his self-sacrificing patriotism and humility. In closing the dissertation in which he announced his invention, he made this stirring appeal to the men who were to take up the work at the point at which he left it: "This vast subject lies with mighty weight on my mind, and I have bestowed on it my utmost attention, and here offer the public the best thoughts and sentiments I am master of. I have confined myself in this dissertation entirely to the nature, reason, and truth of my subject, without once adverting to the reception it might meet with from other men of different prejudices or interests. To find the truth, not to carry a point, has been my object. I have not the vanity to imagine that my sentiments may be adopted; I shall have all the reward I wish or expect, if my dissertation shall throw any light on the great subject, shall excite an emulation of inquiry and animate some abler genius to form a plan of greater perfection, less objectionable and more useful." In response to his first bugle call, made as Madison tells us as early as 1781, the "Continental Convention" he was the first to propose assembled in May, 1787, to make a new Constitution; in response to his second bugle call, made February 16, 1783, three men of genius went to that Convention bearing with them as a basis for its action, in rigidly constructed formulas, his invention, "the most wonderful work ever struck off at a given time by the brain and purpose of man." In the full sense of the term the three draftsmen were men of genius, who did all that remained for them to do. The great invention having been made in advance, they could not make it over again; it only remained for them to restate it and adapt it to the practical end for which it was designed. As each draftsman restated the new theory from his own point of view, each plan may be compared to the facet of a diamond from which the central light must flash at the angle it defines. As the proceedings of the Convention remained a sealed book until long after Pelatiah Webster's death at Philadelphia in

His two bugle calls of 1781 and 1783.

Record of Convention a sealed book to him.

September, 1795, he of course never saw any of the plans offered; nor did he have any means of investigating the parliamentary processes through which the finished product finally arose out of those plans.

Webster first to defend the new Constitution.

Not until the completed instrument was given to the world, after the adjournment of the Convention on the 17th of September, was Pelatiah Webster able to greet and defend the child of his brain with a father's zeal and a father's love. When on the 29th of that month an unpatriotic minority of sixteen members of the Assembly of Pennsylvania — after attempting on the day before to delay by breaking a quorum the reference of the new Constitution to conventions of the states — bitterly assailed it in an address to their constituents, Webster's strong right arm was the first raised to defend it. In falling upon the factious secessionists he said:[1] "It appears the great object, the great motive of this desperate step, was to render ineffectual a resolution of the House (carried by forty-three against nineteen) 'recommending the calling of the convention to consider of the Constitution proposed by the Federal Convention, and to approve or disapprove of the same.'" After answering the objections, stated in the address, to a federal assembly of two chambers, very nearly in the language in which he had originally proposed such an assembly, he said: "Vide a 'Dissertation on the Political Union and Constitution of the Thirteen United States,' published by a citizen of Philadelphia, February 16, 1783, where the subject is taken up at large." Then in defending "the power of taxation vested in Congress," which he had also been the first to propose, after summarizing his original argument in favor of it, he said: "No man has any right to find fault with this article, till he can substitute a better in its room." In replying to the objection of the sixteen "that the liberty of the press is not asserted in the Constitution," he said: "I answer, neither are any of the Ten Command-

Refers expressly to his original paper.

[1] This remarkable and practically unknown paper, published Oct. 12, 1787, is entitled "Remarks on the Address of sixteen members of the Assembly of Pennsylvania to their constituents, dated Sep. 29, 1787, with some strictures on their objections to the Constitution, recommended to the late Federal Convention." On the original print, to be seen in the Library of Congress, this appears: "Philadelphia. Printed by Eleazer Oswald, at the Coffee House, M.DCC.LXXXVII." See Appendix XIX.

ments, but I don't think it follows that it was the design of the Convention to sacrifice either the one or the other to contempt." In reasserting the supremacy of federal law he said: "If admitting such powers into our Constitution can be called a sacrifice, 't is a sacrifice to safety, and the only question is whether our union or federal government is worth this sacrifice." In conclusion he said: "That the distresses and oppressions both of nations and individuals often arise from the powers of government being too limited in their principle, too indeterminate in their definition, or too lax in their execution, and of course the safety of the citizens depends much on full and definite powers of government, and an effectual execution of them." A few weeks later, when "Brutus" — probably Robert Yates, a member of the Convention from New York — made a like assault, Webster was ready with a sharp reply in a pamphlet dated Philadelphia, November 4, and entitled, "The Weakness of Brutus Exposed: or some remarks in vindication of the Constitution proposed by the late Federal Convention against the objections and gloomy fears of that writer." [1] "Brutus dwells," he said, "on the vast powers vested in Congress by the new Constitution, i. e., of levying taxes, raising armies, appointing federal courts, etc.; takes it for granted that all these powers will be abused, and carried to an oppressive excess; then harangues on the dreadful case we shall be in when our wealth is all devoured by taxes, our liberty destroyed by the power of the army, and our civil rights all sacrificed by the unbounded power of the federal courts. And when he has run himself out of breath with this dreary declamation, he comes to the conclusion he set out with, viz., that the thirteen states are too big for a republican government, which requires small territory, and can't be supported in more extensive nations." To that Webster answered: "We must have money to support the Union, and therefore the power of raising it must be lodged somewhere; we must have a military force, and of consequence the power of raising and directing it must exist; civil and criminal cases of national concern must arise, therefore there must be somewhere a power of appointing courts to hear and determine them. These powers must be

His reply to "Brutus."

[1] "Printed by and to be had of John Sparhawk, Market Street, near the Court House. M.DCC.LXXXVII."

vested in Congress; for nobody pretends to wish them vested in any other body of men." In conclusion he asks: "By what sort of assurance, then, can Brutus tell us that the new Constitution, if executed, must certainly and infallibly terminate in the consolidation of the whole into one great republic, subverting all the state authorities? His only argument is, that the federal powers may be corrupted, abused, and misapplied, 'till this effect shall be produced.'" Webster's counterblast was: "The same argument will prove, with equal cogency, that the constitution of each particular state may be corrupted in practice, become tyrannical and inimical to liberty. In short, the argument proves too much, and therefore proves nothing: 't is empty, childish, and futile, and a serious proposal of it, is, I conceive, an affront to the human understanding." After thus disposing of the despairing Brutus, he concludes with this weighty reflection: "No form of government can preserve a nation which can't control the party rage of its own citizens; when any one citizen can rise above the control of the laws, ruin draws near. 'T is not possible for any nation on earth to hold their strength and establishment when the dignity of their government is lost, and this dignity will forever depend on the wisdom and firmness of the officers of the government, aided and supported by the virtue and patriotism of their citizens; . . . the grand secret of forming a good government is, to put good men into the administration."

Weighty reflections.

As the new Constitution, which Webster first designed and then defended, grew into a popular idol, and, as such, passed through a process of canonization, the master builders who composed the Convention came to be regarded rather as demigods than as men. But while they were being thus exalted, and justly, the veil of secrecy — which for fifty-four years was not entirely lifted from all that took place within the secret conclave — concealed from the eyes of the world the Titanic figure in the background that is now looming up large on the distant horizon and becoming more and more distinct in the light of its increasing glory. With a perfect comprehension of the grandeur of his achievement, and with a trusting faith in the justice to be done him in the time to come, the great architect took the precaution in 1791 to republish his dissertation with notes, in which he stated with considerable detail the

Canonization of the new Constitution.

Webster's republication and appeal to posterity.

circumstances attending its original publication. At the close of that republication he made, with stately dignity and humility, this appeal to posterity: "But if any of those questions should in future time become objects of discussion, neither the vast dignity of the Convention, nor the low, unnoticed state of myself, will be at all considered in the debates; the merits of the matter, and the interests connected with or arising out of it, will alone dictate the decision." That appeal and the document of February 16, 1783, survive as immortalities. The eminent French critic and historian Ch.-V. Langlois has said: "History is studied from documents. Documents are the traces which have been left by the thoughts and actions of men of former times. There is no substitute for documents: no documents, no history." While the priceless legacy bequeathed by the immortal document of February 16, 1783, has become the heritage of swelling millions, an humble and neglected grave at Philadelphia[1] has been the only recompense so far received by its author. Every drummer boy, every foreigner who rendered conspicuous service to the patriot cause during the Revolutionary era has been honored by a monument, — only the architect of our Federal Constitution has been forgotten.

[1] "Pelatiah Webster, the eldest son of Pelatiah and Joanna (Smith) Webster, and grandson of George and Sarah Webster, of Lebanon, Connecticut, was born in Lebanon, on November 24, 1726. . . . He died in Philadelphia, September 10, 1795, in his 69th year. His wife died in Philadelphia of the yellow fever, in October, 1793, and their only son died early. Their two daughters [Ruth and Sophia] married, respectively, John and Thaddeus Perit, and three of their children were graduated at Yale." Dexter's *Yale Biographies and Annals*, ii, 97 to 102. The son of Ruth Webster and John Perit was Pelatiah Webster Perit, a famous New York merchant, who was for many years president of the Chamber of Commerce in that city. See Perkins, *Old Houses of Norwich, Conn.*, 322.

# CHAPTER III

## THE EVOLUTION OF THE TYPICAL AMERICAN STATE

The two Anglo-Saxon migrations.

THE two most important single events in the history of the western world were the Anglo-Saxon migration from the Continent into Britain, which began about the middle of the fifth century, and the Anglo-Saxon migration from Britain to the eastern coast of North America, which began early in the seventeenth century. Out of the first migration grew the dominant state in Britain known as England, out of the second grew the forty-six reproductions of that state which now constitute the American Commonwealth. When the two migrations are viewed as a connected whole it is easy for the student of the Science of Politics, who recognizes the law of growth as the law of constitutional life, to trace the mighty stream of Teutonic democracy from its sources in the village moots and state assemblies of Friesland and Sleswick across the Northern Ocean into Britain, and across the Atlantic into North America. By that process it is possible to demonstrate that the Federal Republic of the United States is the lineal descendant of those ancient German tribal federations of which we catch our first glimpses in the pages of Cæsar and Tacitus. In the entire history of institutions it is impossible to find any example so striking of the persistent and unbroken development of political organization from its primitive forms in the simple life of the barbarian up through all the advancing stages of civilization to the climax in the most complex political organism that ever existed.

Unbroken political development.

Growth of the English state in Britain.

Through the first migration the Teutonic invaders transferred from the fatherland into Britain that tenacious system of local self-governing communities out of whose union arose the old English commonwealth, which represented an aggregation of shires, — each shire representing an aggregation of hundreds, each hundred an aggregation of townships. When the Norman came he seized the central powers of the state, and upon the Old-English system as a substructure he built up

a new central system as a superstructure, and out of the fusion between the two gradually emerged the English Constitution as it exists to-day. The English emigrants who founded upon the eastern coast of what is now the United States a group of colonial commonwealths brought with them in their blood and bone that peculiar system of state organization which had been thus maturing in an island world for more than a thousand years. They brought with them ready-made the language, the laws, the political institutions of the old land, to be modified and adapted to the changed conditions of the new. The settlements made by the English colonists in America in the seventeenth century were in all material particulars substantial reproductions of the English settlements made in Britain in the fifth. In both instances the settlers crossed the sea in ships in small companies, and in both lands they grouped themselves together in distinct and practically independent self-governing communities. The thirteen English colonies that arose on our Atlantic seaboard out of the aggregation of such communities were in no sense artificial creations, — they were the predestined product of a natural process of reproduction. American constitutional history therefore begins, not with the landing of the English in America in the seventeenth century, but with the landing of the English in Britain in the fifth.

Substantial identity of two great settlements.

Out of the Anglo-Saxon migration across the Atlantic, which Darwin once said may very likely be the most important event in human history, grew the thirteen colonial commonwealths that fringed our Atlantic seaboard towards the close of the eighteenth century, and out of their union finally arose the Federal Republic of the United States. The founders of these English states in America, who crossed the sea in ships in small companies, expelled the native race, and then replanted their ancient and peculiar system of political institutions in a free and unencumbered soil from which they drew absolutely nothing. The political communities thus replanted as exotics were reproductions in a modified form of the mother state known as England. Something like eight centuries before, that mother state arose out of a series of settlements made by a set of Low-Dutch tribes, known as Engles, Saxons, and Jutes, who likewise crossed the sea in ships in small companies, and, after expelling the native race within a given area, created in Britain

Darwin's statement.

Two migrations contrasted.

"a Germany outside of Germany." [1] The mother state thus replanted as an exotic on a foreign soil drew therefrom practically nothing. So for the fatherland of the English race we must look far away from England itself. At the time of the migrations into Britain the Engles, or at least a portion of them, were residing in Angeln,[2] or Engleland, within the district which is now called Sleswick, while the main body lay probably in what is now Lower Hanover and Oldenburg. On one side of them the Saxons of Westphalia occupied the land from the Weser to the Rhine; on the other, the Eastphalian Saxons stretched away to the Elbe; while to the north of the fragment of the English folk in Sleswick lay another kindred tribe, the Jutes, whose name is still preserved in their district of Jutland. The three tribes were of the purest Teutonic type, and all spoke dialects of the Low German. Upon these data was based the statement heretofore made that, by the aid of the historical method, it is not difficult to trace the mighty stream of Teutonic democracy from its sources in the village moots and state assemblies of Friesland and Sleswick across the Northern Ocean into Britain, and across the Atlantic into North America. The student of American constitutional history must therefore take as his starting-point the primitive political institutions of the three tribes before the migration into Britain began; and for that starting-point he must look to the brief history of the childhood of the whole Teutonic race as contained in those terse sketches of the ancient freedom which have been preserved by Cæsar and Tacitus.[3]

The starting-point.

That homogeneous race called Teutonic, although possessed of a common system of social, religious, and political institutions, was nevertheless broken up into an endless number of communities or states, which stood to each other in complete political isolation, except when united in temporary confederacies. In their general descriptions of the German people both Cæsar and Tacitus had constantly in mind the existence of these disconnected states into which the race as a whole was

*Civitas* of Cæsar and Tacitus.

[1] Taine, *Hist. of Eng. Literature*, i, 50.

[2] "In the fifth century after the birth of Christ the one country which we know to have borne the name of Angeln or England lay within the district which is now called Sleswick." Green, *Hist. of the Eng. People*, i, 87.

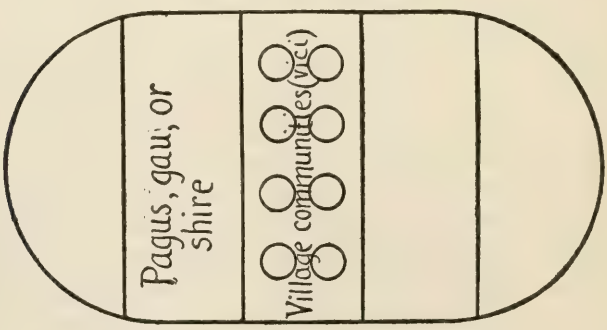
[3] *De Bello Gallico*, vi, 23; *Germania*, cc. 8, 10, 12, 13, 14, 15, 19, 25, 30, 41.

subdivided, and which each termed the *civitas*, with the explanation that what was true of the race in one state was true of the race in all the states, excepting, perhaps, the few particulars in which the monarchical differed from the non-monarchical. The primary bond that united the people of a state (*civitas*) was a personal one; the king was the head of the race, the first among the people, and not the king of a particular area of territory. The largest division of such a state is usually designated in Latin *pagus;* in German, *gau* or *ga;* in Old-English, *scir* or *shire*, terms that finally gave rise on the Continent to the word "hundred." The hundreds were divided into village communities, the *vici* of Tacitus, who says that Teutonic society embraced four ranks or classes: the nobles, simple freemen, freedmen, and slaves. These four classes dwelt either in villages, *vici*, with a series of adjoining buildings, every homestead having a vacant space of ground about it; or apart from villages in isolated homesteads, wherever a grove, meadow, or spring happened to attract them. The following diagram illustrates in a general way this primitive system of state organization which is the starting-point of everything.

*Pagus, gau,* or *shire.*

Four classes.

THE STATE (*civitas*)




The village community.

The *vicus* represents the Teutonic form of the village community, and the portion of territory occupied by it is termed in the German muniments the "mark," a place marked with definite boundaries. In the mark-moot or town-meeting was transacted all the business that arose out of the system of common cultivation, and out of the enjoyment of common

rights.[1] The German mark became the English township, which was reproduced in its primitive form in New England, with its town-meeting and common lands, intact. The affairs of Boston continued to be administered by its town-meeting down to 1822, when its qualified voters numbered seven thousand.[2] Despite the fact that when the population of a New England town exceeds 10,000 or 12,000, it is usual for it to be incorporated as a city, "the town system is the general one; the city, or representative system, is the exceptional one." [3]

Boston.

By the union of two or more marks was formed the *pagus*, *gau*, or *shire*, known in later times as the hundred. "The hundred, and the principle that the hundred community is a judicial body outlived the storms of the folk wanderings, the political creations of Clovis, the reforms of Charlemagne, the dissolution of the Frankish Empire, the dissolution of the county system." [4] The hundred court, like all other Teutonic courts, was a popular assembly, composed of all freemen resident in the district. In this court was administered regularly and frequently the customary law; it met, perhaps, once a month, and in addition to its judicial duties, it discharged many administrative functions. In the state assembly a chief was chosen to act as a magistrate in each hundred. He presided in the hundred court and with him were associated a hundred assessors, chosen from the body of the people, who attended to give their advice and to strengthen the hands of justice. As by a union of two or more marks the hundred was formed, so by the union of two or more hundreds the state was formed. The supreme powers of the state were vested in a state assembly, in which every freeman had his place; each had an equal voice; and it was the custom for all to appear fully armed. The business presented was all prepared beforehand by a permanent council composed of the magistrates, *principes*, who decided all minor questions, reserving only the graver ones for the consideration of the whole people. In the state assembly, as a high court of justice, accusations were exhibited, and capital offenses prosecuted.[5] Those guilty of treason and desertion were hanged;

The hundred and the hundred court.

The state assembly.

[1] G. L. von Maurer, *Markenverfassung*, 142; *Einleitung*, 141–150.

[2] See Josiah Quincy's *Municipal Hist. of Boston*, 28, 41.

[3] Dillon, *Municipal Corporations*, i, 101, and note; Fiske, *American Political Ideas*, 33.

[4] Sohm, *Die fränkische Reichs- und Gerichtsverfassung*, i, 541.

[5] Sohm, *loc. cit.*, p. 5.

those guilty of cowardice and unnatural vices were suffocated in the mud. All other offenses could be atoned for by fines, a part of which was paid to the king or state and part to the person injured or to his family.

Military organization.

So closely did the scheme of military organization resemble the system of political organization, that a comparison has happily been made between the state in its territorial aspect and the army in permanent encampment.[1] The mass of the people fought together in groups that represented the village communities; each *pagus* or hundred contributed its hundred warriors to the host; while the third element of the army consisted of bands of professional warriors, united to a leader of their choice in a close and peculiar clanship, called the *comitatus*. When the whole people were in arms we have "popular assembly, parliament, law court, and army all in one." [2] In other words, the primitive Teutonic state was a personal organization, a marching military state. It is therefore easy to understand how an army of invasion, composed either of the whole people of a state or of a single division, embodied in its organization the primitive political system, which it would naturally reproduce, in whole or in part, whenever a settlement was made in conquered territory. If the expedition happened to be composed of a single group of kindred, upon a settlement being made in a new land its members would naturally draw together upon the old plan in a village community.[3] If the expedition happened to be composed of many groups, united under a common leadership, a cluster of village communities would as naturally result. After the units of organization had thus been reproduced and brought into contact, first the hundred and last the state (*civitas*) would reappear. With these facts firmly in hand it is comparatively easy to understand how the transfer of the primitive Teutonic system from the Continent into Britain was brought about.

Transfer of institutions.

Period of Teutonic conquest.

During the century and a half that intervened between the middle of the fifth century and the end of the sixth, the Teu-

[1] Stubbs, *Constitutional History*, i, 31.

[2] *Essays in Anglo-Saxon Law*, p. 8.

[3] "And as they fought side by side on the field, so they dwelled side by side on the soil. Harling abode by Harling, and Billing by Billing; and each 'wick' or 'ham' or 'stead' or 'tun' took its name from the kinsmen who dwelled together in it." Green, *Hist. of the Eng. People*, i, 10.

tonic settlements in Britain were made. Within that period the whole island, south of the firths of Forth and Clyde, passed from the possession of the native race to that of the conquerors, with the serious exception of a broad and almost continuous strip of country extending along the entire western coast, and embracing North and West Wales, Cumbria, and Strathclyde. Within that area the entire native or Welsh population withdrew, with whatever of civilization, religion, or law they had derived from Rome. In that part of the land the conquerors made their own, they planted the entire fabric of Teutonic life — social, political, and heathen — which they had brought with them in their blood and bone from the fatherland. It is therefore impossible to exaggerate the importance of this period of conquest and settlement, — it is the starting-point of everything. At the moment that period ends Christianity begins, and from its introduction the committing of the customary law to writing appears to have begun.[1] Just before the end of the eighth century, we have the "Ecclesiastical History" of Bæda, from which is derived the only substantial account of the century and a half that followed the coming of Augustine. To these imperfect records have been added the fruits of the most exhaustive archæological and geographical research. The one fact we learn from these sources that stands out in importance above all the rest is that the Teutonic conquerors of Britain founded at the outset what are generally known as the early kingdoms which were genuine reproductions of the states (*civitates*) described by Cæsar and Tacitus [2] and illustrated by the foregoing diagram. In tun-moot as in mark-moot the assembled villagers met to regulate their local and agricultural concerns; in the *gemot* or meeting of all the freemen resident within the *pagus* or early shire, we have in fact, if not in name, the hundred court of the Continent; while the primitive state assembly is the folk-moot, the meeting of the whole people in arms. These early kingdoms, which preserved their ancient boundaries, their national assemblies or folk-moots, and for

Christianity and the customary laws.

The *rice* or early kingdom.

[1] The promulgation of the laws of Æthelberht took place at some time between the coming of Augustine in 596 and his death in 605. Bæda says these laws were enacted "*cum consilio sapientium.*" *Hist. Eccl.*, ii, 5.

[2] "The *civitas* or *populus* of Tacitus, the union of several *pagi*, is in Anglo-Saxon history the *rice* or kingdom." Stubbs, *Const. Hist.*, i, 119.

a long time their tribal kings, became shires or counties in the aggregation finally known as the Kingdom of England. The map of England of to-day clearly discloses the origin of the modern shire in what may be called the primitive *rice* or kingdom. Out of the principalities founded by the Somersætas, the Dorsætas, the Wilsætas, the Middle Saxons, the East Saxons, the South Folk, the North Folk, have grown the shires of Somerset, Dorset, Wilts, Middlesex, Essex, Suffolk, and Norfolk. Hampshire, Berkshire, and Devonshire are equally ancient, being mentioned in the "Chronicle" as shires as far back as Æthelwulf.[1] Kent and Sussex are two of the heptarchic kingdoms whose original shires are perhaps represented by their lathes and rapes. In Wessex the shire system attained its earliest and purest development. The West Saxon shires retain to this day the names and boundaries of the early settlements founded by the successors of Cerdic. It is more than likely, however, from the evidence of local nomenclature that Mercia was artificially divided into shires by the English kings after the reconquest from the Danish invaders.[2] The Kingdom of England is, in fact, a mere aggregation of shires, whose governments represent the entire local machinery of the Constitution.

Origin of the modern shire.

It is all important to grasp at least the outline of the process of aggregation out of which the Kingdom of England finally arose. While the development of Germany advanced in the path of political consolidation, that of England advanced in the path of political confederation. The course of that development is broken into two well-defined epochs: the first, embracing the drawing together of the early kingdoms into the seven or eight aggregates generally known as the heptarchic states; the second, the drawing together of the heptarchic states into the one united kingdom of all the English under the House of Cerdic. When written history first reveals to us through the pages of Bæda the form the new society in Britain had assumed, the seven or eight aggregates, generally known as the heptarchic states, were even then manifesting a tendency to group themselves in three great masses, soon to be known as the kingdoms of Northern, Central, and Southern Britain.[3]

Process of aggregation.

[1] *E. Chron.*, a. 851, 860.

[2] Freeman, *Norm. Conquest*, i, 32, and Appendix, note E.

[3] Green. *The Making of England*, 299 n.

By 593 it is probable that this threefold division was clearly established. How to destroy it so as to unite the whole English nation under the rule of a single overlord was a problem that required for its solution a period of more than two hundred years. The first effort to establish such a unity, clearly foreshadowed and encouraged by the unity of the church, was made by Northumbria,[1] whose supremacy was established over all the English kingdoms except Kent. With her failure in 659 Mercia essayed the task, but despite the fact that Offa, who succeeded to the throne in 758, rose high enough to aspire to a correspondence on equal terms with Charles the Great, he was never able to establish his overlordship over either of the rival kingdoms of Northumbria and Wessex.[2] To the latter, which grew out of a small settlement made on the coast of Hampshire by an invading host led by the ealdormen, Cerdic and Cynric, was to come the final victory. In 825 Ecgberht, after extending the supremacy of Wessex to the Land's End, ventured in the hour of victory, for once at least, to style himself King of the English.[3] Through his conquests all the Teutonic states in Britain became mere dependencies of Wessex, as under-kingdoms. Not, however, until after a century and a half had passed by did these loosely united states become incorporated as integral parts of one consolidated kingdom. That result was accomplished during the reign of Eadgar the Peaceful, which began in 958. The growth of a real national unity was now complete; the consolidated Kingdom of England was made not only in fact but in name. "Wessex has grown into England, England into Great Britain, Great Britain into the United Kingdom, the United Kingdom into the British Empire." [4]

Threefold division broken down after two centuries of struggles.

Triumph of Wessex in 825.

Eadgar the Peaceful, 958.

With the triumph of Ecgberht began the work of consolidation which occupied nearly a century and a half in its completion. In that process local kingship became extinct, and the primitive states were finally incorporated with Wessex, — they

Work of consolidation.

[1] Under Eadwine, *E. Chron.*, a. 617.

[2] The Mercian supremacy was broken by the West Saxons in 754 upon the field of Burford. *E. Chron.* a. 752. From 752 to 848 the entries of the *English Chronicle* are wrong by two years. See Stubbs, *Roger of Hoveden*, preface to vol. i, lxxxix, Rolls Series.

[3] "Ecgberhtus gratiâ Dei Rex Anglorum." *Codex Diplomaticus Ævi Saxonici*, i, 287.

[4] Freeman, *Norman Conquest*, i, 16.

ceased to exist as states and became shires. And as the primitive states thus descended in status, their own shires necessarily descended in the same way, — they ceased to be shires and became hundreds. Thus it may be assumed, as a general principle, "that the state of the seventh century became the shire of the tenth, while the shire of the seventh century became the hundred of the tenth." [1] The use of the word "shire" in the enlarged and modern sense seems to have been introduced during or shortly after the reign of Ecgberht; but the name of the hundred does not occur until the laws of Eadgar,[2] in whose time the arrangement of the whole kingdom in shires was probably completed. After that event the consolidated kingdom is, in fact, a mere aggregation of shires, whose governments represent the entire local machinery of the Constitution. Or, to state the matter in another form, now the kingdom forms a new whole, of which the shires have sunk to be mere administrative divisions. But in descending to the status of a shire, the primitive state preserved substantially all its powers as a self-governing community. While the tribal king has passed away, and his place has been filled by the ealdorman, who stands in the government of the shire as the deputy of the national king, the popular assemblies of the primitive state all survive as parts of the shire system. The primitive state assembly is the folk-moot, the highest popular court of the shire, and as such it retains some traces of the ancient nationality. It survives as the shire court of the modern shire, while the primitive shire court survives as the hundred court of the consolidated kingdom, the ordinary law court in which cases are heard in the first instance. Beneath the hundred courts stand the tun-moots, the governing bodies of the village communities or townships. In the organization of these local courts the fundamental Teutonic principle is preserved intact; the administration of law, as well as political administration, is vested in an expanding series of popular assemblies composed of the qualified freemen whose interests are directly involved. In these popular assemblies of the hundred and the shire the customary law, the jury system, and its twin brother, the repre-

Ancient state becomes modern shire.

State assembly survives as shire-moot.

Germs of jury system and representative system.

[1] See essay upon the "Anglo-Saxon Courts of Law," by Henry Adams, in *Essays in Anglo-Saxon Law*, 19.

[2] Eadgar, i, *Constitutio de hundredis.*

sentative system, were born and nurtured. The earliest manifestation of the representative principle appears in the form of the reeve and four selected men, who represent the township in the courts of the shire and the hundred.[1] In the shire court the reeve and four men appeared for each township, the twelve senior thegns for each hundred. The shire court was, therefore, not only a popular but a representative assembly, — a county parliament in which each township and hundred appeared in the person of its representatives. As all other methods of trial except trial by jury gradually fell into disuse, and as the king's courts held in the shires were gradually relieved of all fiscal and administrative work, the county parliaments, which were originally convened to meet the itinerant justices, were slowly transformed into the modern courts of assizes, in which the itinerant justices still preside, but in which the general assembly of the shire is represented only by the grand and petty jurors summoned by the sheriff for the dispatch of the civil and criminal business to be disposed of.[2] Such is the historical origin of the Old-English system of local self-government as embodied in the township, the hundred, and the shire, a system which is to-day the political substructure of every state in the American Union. In the words of Tocqueville: "In America . . . it may be said that the township was organized before the county, the county before the state, the state before the Union." [3] It may be stated as a general rule that the English colony in America, like the English state in Britain, represented an aggregation of counties, and that each county represented an aggregation of townships. The hundred — the intermediate division between the township and the county — appeared in the structure of some of the colonies, but being unnecessary to the local wants of the new land, it passed out of view. The hundred existed in Virginia and Maryland, and maybe elsewhere.[4]

Modern courts of assize.

Political substructure of the American state.

[1] This fact, "left questionable in the laws, is proved by the later practice." Stubbs, *Const. Hist.*, i, 115. See also Bigelow, *History of Procedure*, 133.

[2] Upon that difficult subject, see Taylor, *The Origin and Growth of the English Constitution*, i, 314, "Development of the Itinerant Judicature and the Origin of Juries."

[3] *Democracy in America*, i, 49.

[4] As to its history in Virginia, see "Local Institutions of Virginia," Ingle, *Johns Hopkins Studies*, 3d series, ii–iii, 41. "A Tything-man in each manor, a constable in each Hundred." Bacon, *Laws of Maryland*, 1638.

Old-English central organization.

Thus it appears that after the work of consolidation was completed, the substructure of the Old-English Commonwealth consisted of the shire system, each shire representing an aggregation of hundreds, and each hundred an aggregation of townships. Upon that solid foundation, which has never been undermined, rested a weak and loosely organized system of central government represented by the king and the witenagemot. It is generally admitted that the Teutonic tribes that invaded Britain were non-monarchical. As conquest advanced, and as definite districts of country were permanently settled, and as the various groups felt the need of drawing together under a permanent leadership, the ealdorman or *heretoga*, war-leader, was advanced to the dignity of a king who could represent in his person the unity of a new national life.[1] The name of the son was associated with that of the father as a recognition of the hereditary principle; and in order to impart dignity to the person of the new king, fable at once traced his descent in an unbroken line from Woden. But the recognition of the hereditary principle was attended and modified by the older principle of election. The right to the throne might be vested by the original choice in a single royal house, but the question as to which member of that house should receive the succession when a vacancy occurred was one which the witan alone could determine. No matter who succeeded to the throne, the theory was that he succeeded by virtue of an election; he was "*gecoren and áhafen tó cyninge*," — elected and raised to be king.[2] The witan, which possessed the power to elect the king, possessed also the correlative right to depose him whenever his government was not conducted for the good of his people.[3] As the process of aggregation advanced, the institution of kingship grew with each extension of territory. As an heptarchic king rose in power and importance above the petty royal head of a primitive state, so did the king of all the English rise in power and importance above an heptarchic king. Thus overshadowed,

Elective kingship.

[1] "The word *rice* I take to mark the change from ealdormanship to kingship." Freeman, *Norm. Conq.*, i, 392, Appendix K.

[2] "The possession of Woden's blood was the indispensable condition of kingship." Kemble, *Saxons in England*, i, 329; ii, 215, 219.

[3] As to the formal and regular deposition of Alchred of Northumbria, see *E. Chron.*, a. 755; Flor., *Wig.*, a. 755.

Provincial royalty died out.

provincial royalty finally died out, after lingering in Northumbria until the death of the last Danish king in 954. A few years after that event, Eadgar succeeded to the threefold sovereignty of the West Saxons, Mercians, and Northumbrians, and thus became the first sole and immediate king of all the English.[1] Every royal house to which conquest had given birth was now extinct except the West Saxon House of Cerdic, — as the fittest it survived.

Constitution of the witenagemot.

In the early kingdoms in which the Teutonic settlers originally grouped themselves in Britain, the state assembly appears as the folk-moot, the meeting of the whole people in arms; in the larger aggregates known as heptarchic kingdoms the national assemblies are not folk-moots at all, but witenagemots; they are not great popular assemblies of an entire nation, but small aristocratic assemblies composed only of the great and wise men of the land. In the absence of the principle of representation in the higher sphere of politics, it is easy to understand how an originally democratic assembly, into which the magnates of the land entered as dominating factors, would naturally shrink up into a narrow aristocratic body composed of the magnates only, wherever the extent of the territory to be traversed rendered it difficult for the mass of the people to attend. The results of that principle are practically the same, whether worked out in England or Achaia.[2] As the process of aggregation was attended by an increase in the power of the king and thegnhood, and by a consequent depression of the popular power, without the formal exclusion of any class, the mass of the people simply ceased to attend assemblies in whose deliberations they could take but a subordinate part. Thus, through a perfectly natural process, the folk-moot, the meeting of the people, was converted into a witenagemot, a meeting of the wise, in which were considered all matters involving the general good. Such is the history of the witenagemot, whether considered as a supreme council of an heptarchic state, or as the supreme council of the whole English nation when finally united in a single consolidated kingdom. The weakness of the Old-English Commonwealth was in its superstructure. The

England and Achaia.

[1] "It was not till Eadgar's day that the name of Britain passed into the name of Engla-land, the land of Englishmen, England." Green, *History of the English People*, i, 96.

[2] Cf. Freeman, *Comparative Politics*, v, "The Assembly."

national unity that grew up through a premature and imperfect concentration of powers around a single throne was constantly strained and weakened by the counter-force of the feudal and provincial spirit. The greatest defect in the political system as a whole arose out of the looseness of the tie that bound the central powers of the state to the local machinery of the Constitution. There was a want of a strong organic connection between the King and the Witan, as the representatives of the nation, and the system of provincial organization embodied in the shires, — a want never to be supplied until representatives from the local communities finally drew together in an assembly which became coördinate with the King's Council. The political history of the century that intervenes between Eadgar the Peaceful and William the Conqueror (958–1066) is the history of the struggle between the power of the nation as embodied in the Crown and the provincial power asserted by the great ealdormen, who were ever striving in the direction of feudal isolation. In that struggle the defensive power of the nation was broken; the spirit of disunion and disorder that was ever assailing the foundations of the throne was equally ready to paralyze the national arm in the presence of the invader. The feudal tendency to disruption does not prevail simply because the great Earl Godwine, who is striving to win the crown for his own house, is strong enough to counteract it. Upon his death (1053) the earldom of the West Saxons passed to his son Harold, who for twelve years stood forth as the real master of the realm. But when, upon the death of the childless Eadward, Harold was elected by the Witan to the vacant throne, it was impossible even for him to bind together the broken power of the kingdom, with the great earldoms of Mercia and Northumbria in the hands of his two jealous rivals, Eadwine and Morkere, whose treacherous policy really opened the way to the Norman Conquest. "When Harold, imitating the Capetians, raised himself to the throne, the natural consequence would seem to have been that England should share the fate of France. To have prevented this is the one great service which William rendered to mankind." [1]

Lack of cohesion between central and local powers.

Feudal tendency to disruption checked by Godwine.

Norman duchy and its dukes.

The history of the Norman duchy begins with the planting in 911 of the Danish colony at Rouen by Rolf or Rollo, who in

[1] *North American Review* for July, 1874, 238.

the next year received from Charles the Simple the grant of the district on both sides of the Seine which he had already won by the sword. If any records ever existed touching the details of the settlement or touching the legal and political institutions planted by its founders in Gaul, they have utterly perished. There are no chronicles, no charters to guide us; of the internal organization of the Norman duchy in the early days of its history we know absolutely nothing. It seems, however, to be clear that the Norman dukes from the very beginning ruled not as absolute sovereigns, but with the advice of some kind of an assembly or council of great men.[1] As the time for the conquest of England approaches, the Duke consults or professes to consult, the magnates of his realm, lay and spiritual, the *optimates*, the *proceres* of Normandy. The court he holds may not yet be called a court of his tenants-in-chief, but it is an assembly of magnates who are his vassals. It also appears that in the lower courts the lord of the court is not the only judge; he is surrounded by doomsmen.[2] It is in the reign of the third duke, Richard the Fearless, that we can trace the beginnings of the Norman nobility, whose members derive their status as nobles either from ancient Norse descent from the companions of Rolf or through connections, legitimate or illegitimate, with the ducal house. The baronage which thus grew up held their lands of the Duke upon terms of feudal obligation, and by his strong hand alone were they held in subjection.[3] Over this turbulent baronage, William the Bastard, while yet a minor, was called to rule; and his first important victory was won in crushing a widespread revolt headed by some of the greatest nobles of his own dukedom. After such an experience at home, William was able to triumph over Harold because the realm of England was torn by a feudal tendency to disruption which

An assembly of magnates.

[1] Extreme views on this subject are marked at one end by Palgrave (*Normandy and England*, ii, 258 *sq.*) and at the other by Steenstrup (*Indledning i Normannertiden*. Copenhagen, 1876). There is a French translation of the latter in the *Bulletin de la Société des antiquaires de Normandie*, x, 185.

[2] In a suit heard in 1086, in the court of Robert of Bellême, he presides, but three abbots, nine named laymen, and many others are the *judices hujus placiti*. *Neustria Pia*, 311.

[3] Richard the Fearless is regarded as the founder of Norman feudalism. *Normandy and England*, ii, 534. See also Waitz, *Göttingische Gelehrte Anzeigen, Nachrichten*, February 14, 1866, 95, 96.

gave him the victory at Hastings: the "main forces of Northumberland and North Western Mercia came not to King Harold's Muster." With the fall of Harold and the triumph of William, the royal power passed into the hands of one of the wisest and sternest of statesmen. By his inflexible policy the tendency to disruption was checked, the four great earldoms were abolished, and a real national unity at last grew up as the old provincial jealousies were gradually crushed out beneath the yoke of the foreign kings. Under the heel of the stranger the English nation finally awoke to a sense of its oneness.

Fall of Harold and triumph of William.

Nothing could have been more consummate than the policy through which William checked feudal disintegration in England by establishing a strong central government of which he was the directing force. His first move was to make himself a national king, the lawful successor of Eadward through an election by the Witan.[1] By claiming to be the heir of Eadward, he connected himself directly with the line of national kings that had gone before him; by insisting upon his elevation to the royal office by the choice of the Witan, he obtained the highest confirmation of his title that could be drawn from the ancient Constitution. By means of these outward forms William proclaimed the fact, not only to the conquered English but to his Norman followers, that he would rule in his new realm, not as a mere feudal conqueror, but as a national king. The sum of royal power that thus accrued to William by virtue of the ancient Constitution was augmented by the addition of every feudal right that tended to increase the royal revenue and to strengthen the royal authority, while every principle was eliminated that tended to promote the disruptive tendencies of feudal institutions. As King of the English, William was careful to preserve the law of the land as it stood in the days of King Eadward, and along with it those ancient assemblies of the shire and the hundred in which it had been immemorially administered.[2] As feudal lord he firmly established the doc-

William a national king as well as feudal conqueror.

Law of the land and ancient assemblies preserved.

[1] In the church of Eadward, on Christmas Day, amid the shouts of "Yea, yea," from his new English subjects, William, after taking the oaths usually administered to an English king, was crowned and anointed by the hands of the Northumbrian prelate, who, less than a year before, had poured the consecrating oil upon the head of the mighty chief of the House of Godwine. Cf. Green, *Hist. of the English People*, i, 115.

[2] "Requiratur hundredus et com-

trine that the King was the supreme landlord, and that all lands were held by grant from him. In his time the folkland became *terra regis*. All landholders thus became tenants of the King, and under William's successors the feudal revenue of the Crown from that source was enormous. It was William's policy to introduce but one side of feudalism, — to accept it as a system of tenure, but not as a system of government. He was therefore careful to prevent the accumulation in the hands of the great feudatories of any considerable number of contiguous estates; he was also careful to require from all freeholders an oath that bound them to the King by the double tie of homage and allegiance. To every landowner the Conqueror stood in the double relation of landlord and sovereign.

Feudalism as a system of tenure.

When the crown passed to William the Red, the strength of his father's work was put to the test by a great revolt of the chief men of Norman blood throughout England. The new king, thus deserted by the bulk of the greater nobles, at once fell back upon the loyalty of his English subjects, with whose aid the revolt was crushed and the power of the baronage trampled under foot. The royal authority, thus left unchecked by the counter force of the feudal power, became in the hands of the new minister, Ranulf Flambard, an irresponsible despotism. The system of feudal law he is said to have worked into a definite form was applied to all feudatories, temporal and spiritual. By his policy the local courts of the shire and the hundred were turned into engines of extortion; in the words of the Chronicle, "He drove and commanded all his gemots over all England."[1] When William the Red died, the Witan, who were then near at hand, chose his brother Henry as king.[2] The promises contained in Henry's coronation oath, whose exact words are still preserved, were amplified into a comprehensive charter of liberties, which stands not only as the immediate parent of the Great Charter of John, but as the first limitation imposed upon the despotism established by the Conqueror and carried to such a height by his sons.[3] Upon the ruins of the

William the Red.

Flambard and the growth of feudal law.

Henry's coronation oath.

itatus, sicut antecessores nostri statuerunt." *Statutes of William*, § 8.

[1] *Chron. Petrib.*, 1099.

[2] *Chron. Petrib.*, 1100. As to the election, see William of Malmesbury, *G. R.*, v, § 393.

[3] By Henry's charter were restored to the people the laws of King Eadward, which symbolized the ancient Constitution, with such amendments as the Conqueror had made. "Legem Edwardi regis vobis

greater feudatories, Henry raised up a set of lesser nobles, from whose ranks he selected the sheriffs and judges who were to aid him in the work of administrative reform. At the beginning of the Conqueror's reign those who composed the Old-English national assembly known as the Witan were a body of Englishmen; by the end of his reign that body had gradually changed into an assembly of Normans known as the *Magnum Concilium*, in which an Englishman here and there held his place.[1] As the King's thegns became his tenants-in-chief, the ancient assembly of wise men gradually became the King's court of feudal vassals, whose right to exercise power was made to depend practically upon the King's pleasure.[2] The inner circle of the *Magnum Concilium* came to be known as the *Curia Regis*, which, during the Norman reigns, drew to itself the entire central administration of justice and finance. During the reign of Henry, Bishop Roger of Salisbury became Justiciar, and as such he reorganized the new fiscal and judicial system embodied in the *Curia*. From the reign of Henry I, the *Curia*, whose methodical procedure imposed upon the despotic powers of the Crown the restraints at least of administrative routine, can be distinctly traced as a supreme court of justice containing specially appointed judges, and presided over by the King or Justiciar, who is occasionally distinguished by the title of "*summus*" or "*capitalis*." Under the guidance of Bishop Roger, the whole judicial and financial organization of the kingdom, both central and local, was reorganized and remodeled.

The *Magnum Concilium*.

The *Curia*.

The Justiciar.

Stephen and anarchy.

After the accession of Stephen, England, for the first and last time in her history, sank into a state of feudal anarchy which the Conqueror by his far-sighted policy had striven to prevent. But the relapse was only momentary; the system of central government the Conqueror had devised emerged intact upon the making in 1153 of the Treaty of Wallingford, in which Stephen recognized as his heir Henry, the son of Matilda (daughter of Henry I), who had married Geoffry, called Plantagenet, son of Count Fulk of Anjou. The treaty was attended by an elaborate project of reform, which contem-

A project of reform.

reddo eum illis emendationibus quibus pater meus eam emendavit consilio baronum suorum." Art. 13.

[1] Freeman, *Norm. Conq.*, v, 277; *Select Charters*, 17.

[2] A memorable part of his policy consists of his order for the holding of the courts of the shire and hundred. For the text see *Fœdera*, 4, 12; *Select Charters*, 104.

plated among other things the resumption of all royal rights that had been usurped by the baronage, the restoration of estates taken from their lawful owners, the razing of all unlicensed castles, the banishment of the foreign mercenaries from the country, and the appointment of sheriffs to reëstablish justice and order.[1] Thus ended the reign of the fourth and last Norman king. During those four reigns England was given a new system of central government whose extraordinary powers were vested in the *Magnum Concilium*, and whose ordinary powers were vested in its inner circle known as the *Curia Regis*, which has given birth not only to every court of law or equity in which justice is administered in the King's name, but also to the entire administrative machinery of the Constitution. The new system of central government thus built up as a superstructure by the four Norman kings rested upon a substructure they did practically nothing to disturb, — a substructure represented by the ancient Teutonic system of local self-governing communities known as the township, the hundred, and the shire. For a time the superstructure and the substructure had no organic connection with each other. Not until the Angevin period is reached, not until the reign of Henry II and his sons, is there anything like a growing-together of the Norman system of central administration and the tenacious machinery of Old-English local freedom embodied in the organizations of the township, the hundred, and the shire. And the same agencies which, during the Angevin reigns, brought about the amalgamation of the new central administrative system and the ancient local machinery, also brought about a union between the new system of royal law, radiating from the *Curia Regis*, and the ancient system of customary or popular law as administered in the local courts.[2] The accession of Henry of Anjou marks the beginning of the period of fusion

Origin of administrative machinery.

The period of fusion.

Royal and popular law.

[1] For the treaty itself see Stephen's Charter, printed in Rymer, i, 18. The entire scheme of reform which attended it can only be gathered from the contemporary historians. See R. de Monte, 1153; Hen. Hunt, fol. 228; Gervase, 1375; Will. Newberg, i, 30; Roger of Hoveden, i, 212.

[2] A great German jurist has clearly pointed out the fact that in the study of Teutonic law, the distinction must be sharply drawn between such law as flows from a royal or official source, and such as flows from a customary or popular source. As to Sohm's views on that subject, see *North American Review* for July, 1874, p. 222.

between the Norman superstructure and the Old-English substructure whose final outcome was the modern Constitution endowed with the strongest elements of both. In that process of fusion was created the system of law and equity that now prevails in England, in every state of the American Union, and in the federal courts of the United States.

Henry II and the reign of law.

The death of Stephen opened the way for Henry II, "whose statesmanlike activity, whose power of combining and adapting that which was useful in the old systems of government with that which was desirable and necessary under the new, gives to the policy which he initiated in England almost the character of a new creation." [1] The full scope of his policy was not only to establish the reign of law, but to reduce all orders of men to a state of equality before the same system of law. That effort brought him into sharp conflict with the clerical order headed by Becket, the outcome of which was embodied in the Constitutions of Clarendon,[2] a concordat that regulated from that time the relations of the church with the state. In reorganizing the central system, Henry gave definite form to the Great Council, now summoned at regular intervals as a perfect feudal court, — an assembly of archbishops, bishops, abbots, priors, earls, barons, knights, and freeholders.[3] The writs of summons were of two kinds: first, such as were specially addressed to those great personages whose presence was necessary, and who were summoned as a matter of course; second, such as were addressed generally to the sheriff of each shire requiring him to summon in a body the lesser landowners. In reorganizing the *Curia Regis*, its financial aspect was overshadowed by its development as a judicial tribunal. The growth of the judicial business of the *Curia* was so great that in 1176 its staff had increased to eighteen justices, who were apportioned to the six circuits into which the kingdom was divided. In 1179 a new arrangement was made, and out of a larger staff, charged with exchequer business and the work of the circuits, six justices were selected, and "these six are the justices constituted in the *Curia Regis* to hear the complaints of the people." [4] This limited tribunal, which from the year 1179

Constitutions of Clarendon, 1164.

Practice of summons.

Growth of judicial business.

[1] Stubbs, *Const. Hist.*, i, 336.

[2] See R. Diceto, c. 336; Gervase, c. 1385; Bigelow, *Hist. of Procedure*, 52, 53.

[3] *Select Charters*, 22, 23.

[4] "Isti sex sunt justitiæ in curia regis constituti ad audiendum clamores populi." Benedictus, i, 239.

held regular sessions "*in banco*," [1] probably represents the beginning of the King's Bench as a distinct tribunal. By the Assize of Clarendon, 1166, called the most important document of the nature of law or edict that has appeared since the Conquest,[2] whose enforcement was committed to the justices itinerant, the system for the presentation of criminals by grand juries was remodeled, and every franchise opened to the visits of the sheriffs and justices.[3] The trial jury, a subject with an intricate history, is the product of the union of Old-English and Norman elements, the former supplying the germ in the form of community witnesses, the latter supplying the royal writ process through which that germ was finally developed into the trial jury of modern times. The growth of that institution was greatly advanced by Henry II, who introduced into England, under the name of assizes, a new species of the inquest of proof known as the recognition. To the student of English law, the Great Assize, and the assizes of *novel disseisin*, *mort d'ancester*, and *darrien presentment*, the leading recognitions in civil matters, are the most familiar. In England only was the jury of proof transformed into the jury of judgment. There trial by jury gradually superseded all other methods of trial; as the fittest it survived.[4] The Angevin rulers as national kings retained the right to summon, under the lead of the sheriffs, the ancient forces of the shire; as feudal lords they gained the right through the growth of tenures to call upon the feudal army to perform the military service due from their lands. By his Assize of Arms, 1181, Henry undertook to reorganize and renew the ancient force as a body safer and more trustworthy for national defense than the feudal host.[5] As the fruits of feudal tenures were an addition or supplement to the older revenues derived from the ancient system, so the feudal army was an addition or supplement to the older constitutional force of the land. In order to raise money with which to hire mercenaries to be employed in the meditated expedition against Toulouse,[6]

Beginning of King's Bench.

Grand and trial juries.

Assize of Arms, 1181.

[1] As to the "Justiciarii sedentes in banco," see Glanvill, lib. 2, c. 6, lib. 8, c. i, and lib. 11, c. 1; Benedictus, ii, preface, lxxv, Rolls Series.

[2] *Select Charters*, p. 143.

[3] Sir J. F. Stephen, *History of the Criminal Law of England*, i, 68; Palgrave, *Commonwealth*, i, 213.

[4] Upon the whole subject, see Taylor, *The Origin and Growth of the Eng. Const.*, i, 314–334.

[5] Benedictus, i, § 278; *Select Charters*, p. 153.

[6] "*Tolosam bello aggressurus*," etc., John of Salisb. (*Ep.* 145), i, 223.

Scutage, 1159.

Henry dealt a serious blow to the feudal power by establishing in 1159 the institution of scutage or shield-money, a pecuniary commutation for personal service in the host. Up to this point in Henry's reign, — leaving out of view the receipts from the customs, — *all taxation fell upon the land*, and consisted (1) of the ancient customary dues, and the tax on the hide, survivals of the Old-English system; and (2) of the feudal incidents, and the scutage, or tax on the *knight's fee*, — products of the new system of military tenures. When the Angevin financiers were tempted by the mass of personal property brought into existence by the prosperity consequent upon the new policy of order and reform, Henry, in 1188, levied a tithe of movables to aid the common host of Christendom in retaking the Holy City from Saladin. This taxation, for the first time, of personal property was a momentous step, because, whenever any one was suspected of contributing less than his share, four or six lawful men of the parish were chosen to declare on oath what he should give.[1] In that way the representative principle — which first appears in the form of the reeve and four select men who represent the township in the courts of the shire and hundred — is brought into close contact with the system of taxation. In connection with that system the representative principle ascends, through three stages, from the lowest to the highest functions of government. It is first applied in an humble way, through the chosen jurors, to the assessment of the tax; it next becomes involved with the granting of the tax; and finally it determines the method of its expenditure. The principle that taxation and representation are correlative terms — the vital principle involved in the separation of the colonies from the mother country — dates back to the Saladin tithe of 1188.

Taxation of personal property, 1188.

Taxation and representation.

Richard I and taxation.

The system of taxation thus organized by a great statesman and financier was so wantonly applied after his death by a spendthrift knight-errant as to exhaust its resources. From a constitutional standpoint the reign of Richard I is chiefly interesting in so far as it illustrates the improvements in the system of taxation suggested by its constant use, and the oppressions

[1] "Et si aliquis juxta conscientiam illorum minus dederit quam debuerit, eligentur de parochia quatuor vel sex viri legitimi, qui jurati dicant quantitatem illam quam ille debuisset dixisse; et tunc oportebit illum superaddere quod minus dedit." Benedictus, ii, 31.

that arose out of its incessant application to all classes and conditions of men. In 1192 Richard from his Austrian dungeon demanded for his ransom £100,000, double the revenue of his kingdom.[1] In 1196 it was that the poorer citizens of London broke into open revolt at the manner in which the tallage was collected;[2] and two years later a fresh demand for money from the baronage led to a revolt in a higher sphere led by the patriot Bishop of Lincoln, Hugh of Avalon.[3] The nation thus oppressed by the grinding weight of the central government built up by the Norman and Angevin kings was now organizing itself in the ranks of the three estates known as the Clergy, Baronage, and Commons. The causes that brought about the establishment of the estate system were general in their operation, and in each one of the European countries the result was reached at about the same time. The complete establishment of the system is generally regarded by the historians as the work of the thirteenth century. In the history of the English nation the three estates appear as the Clergy, the Baronage, and the Commons.[4] In the words of the Lords' Report, "In England . . . the Clergy have been esteemed one estate, the Peers of the realm the second estate, and the Commons of the realm, represented in Parliament by persons chosen by certain electors, a third estate."[5] The estate system itself consisted of the division of the nation into definite classes or orders of men; the product of the system was that type of a national assembly in which each class or order appeared in person or by representatives.

Rise of the three estates.

The death of the childless Richard in April, 1199, opened the way for his brother John, "the worst outcome of the Angevins. He united in one mass of wickedness their insolence, their selfishness, their unbridled lust, their cruelty and tyranny, their shamelessness, their superstition, their cynical indifference to honor or truth. . . . But with the wickedness of his race he

John as a statesman.

[1] Hoveden, iii, 208, 210, 217, 222. See also preface to Hoveden, iv, lxxxiii, Rolls Series.

[2] For the history of the rising, see Will. Newb., v, c. 20; R. Diceto, c. 691; Hoveden, iv, 5, 6, and preface, iv, lxxxix.

[3] See preface to Hoveden, iv, lxxxi; Freeman, *Norm. Conq.*, v, 465.

[4] And not, as is often erroneously stated, as the King, Lords, and Commons. An argument in favor of that now obsolete theory may be found in Whitelocke's work on the *Parliamentary Writ*, ii, 43.

[5] Vol. i, p. 118.

inherited its profound ability. . . . In the rapidity and breadth of his political combinations he far surpassed the statesmen of his time." [1] Fate did much to cripple such a monster by depriving him, in 1204, of Normandy, whereby the last direct connection of the baronage of England with the land of their fathers passed forever away. That severance completed the great work that had been steadily going on since the Conquest, the work of building up a united English nation. At the head and front of the united nation, which thus arose out of the assimilation of the smaller mass of the conquerors by the greater mass of the conquered, the baronage — Norman in descent, but English in interest and feeling — held its place throughout the prolonged struggle in which the Great Charter was won. That struggle opened in the summer of 1213 with the refusal of the baronage to follow John to France, upon the ground that he was still excommunicated. On August 4, a memorable council was held at St. Alban's, to which were summoned not only the bishops and barons, but also the reeve and four legal men as representatives from each township on the royal demesne.[2] In that meeting the laws of Henry I — the embodiment of the laws of King Eadward as amended by King William — were brought to the attention of the assembly by the Justiciar, Geoffrey Fitz-Peter, and proclaimed as the bases on which the liberties of the nation were to be reëstablished.[3] In a second gathering of the barons, held at St. Paul's in London on the 25th of the same month, Langton produced and read the charter of Henry I, which was warmly accepted as the basis of national action. Finally in November, 1214, the barons, under the pretext of a pilgrimage, assembled secretly at the abbey of St. Edmund for the purpose of casting into final form the schedule of liberties they had resolved to force upon the King. Early in January, 1215, the united baronage met in arms, and on the 24th of May London threw open her

Loss of Normandy, 1204.

Council at St. Alban's, August 4, 1213.

Council at St. Paul's, August 25, 1213.

Meeting at St. Edmund's, November, 1214.

[1] Green, *Hist. of the Eng. People*, i, 229–230.

[2] "In crastino autem misit rex litteras ad omnes vicecomites regni Angliæ præcipiens ut de singulis dominicorum suorum villis quatuor legales homines cum præposito apud Sanctum Albanum pridie nonas Augusti facerent convenire." M. Paris (ed. Watts), 239.

[3] "Quatenus leges Henrici avi sui ab omnibus in regno custodirentur et omnes leges iniquæ penitus enervarentur." M. Paris, ibid. 239.

gates to the patriot host, and Exeter and Lincoln followed her example. In order to save himself from the final humiliation of unconditional surrender, John attempted to conceal the real nature of the submission about to be made under the cloak of a negotiation. With that end in view he invited the barons to a conference on an island in the Thames between Windsor and Staines, near the meadow of Runnymede. On June 15 the delegates met on that island in view of the opposing forces, and after going through the form of a negotiation, agreed upon the Great Charter of liberties in a single day. Though issued in the form of a royal grant, it was in substance a treaty or compact [1] entered into between the royal authority on the one hand and the nation marshaled in the ranks of the three estates on the other. The immortal part that has survived is embodied in the judicial clauses out of which has grown what English and American lawyers call "due process of law." The 39th chapter provides: Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terræ. "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or in any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgement of his peers or by the law of the land." That chapter was so amended in the reissues of Henry III as to read, "No freeman shall be taken or imprisoned or disseised *of his freehold, or liberties, or free customs*, or outlawed, or exiled," etc. It was settled long ago that the guarantee of trial by jury was not involved in the phrase "the lawful judgement of his peers," and that "by the law of the land" was guaranteed at most judgment by some of the contemporary methods of trial, such as ordeal, battle, or compurgation.[2] And yet the chapter in question became "a

Great Charter signed, June 15, 1215.

Chapter 39, "due process of law."

Trial by jury not guaranteed

[1] M. Boutmy, in his comments on the "Constitution Anglais," has this to say: "Les pactes sont au nombre de trois: la grande Charte (1215) . . . Le charactère de cet acte est aisé a définir. Ce n'est pas précisément un traité, puis qu'il n'y a pas ici deux souverainetés légitimes ni deux nations en présence; ce n'est pas non plus une loi; elle serait en tachée d'irrégularité et de violence; c'est un compromis ou un pacte." *Études de droit constitutionnel*, pp. 39–41.

[2] The whole matter is well put by McKechnie, *Magna Carta*, 158 *sq.*, 438 *sq.* See also Hurtado *v.* California, 110 U. S. 529. "The expression '*per legem terræ*' simply required judicial proceedings, accord-

sacred text, the nearest approach to a 'fundamental statute,' that England has ever had." [1] In each age it has been interpreted as a living guarantee of fundamental rights according to the needs of that age. In that way it was given a broad construction by the jurists and statesmen of the seventeenth century during the constitutional struggles with the Stuarts.[2] That construction, as it finally became fixed in the Commentaries of Blackstone, passed at the end of the Revolutionary War into the original constitutions of the thirteen states as a part of the text of chapter 39, reproduced in nearly all of them.

Broad construction.

Chapter 39 embodied in state constitutions.

It appears in the following forms in the state constitutions of 1776. In the act of that year, continuing the charter of Connecticut of 1662 as the organic law of the state, it is provided: "That no man's life shall be taken away: no man's honor or good name shall be stained: no man's person shall be arrested, restrained, banished, dismembered, nor any ways punished: no man shall be deprived of his wife or children: no man's goods or estate shall be taken away from him, nor any ways indamaged under the colour of law, or countenance of authority; unless clearly warranted by the laws of this state." In Maryland's constitution of the same year it is provided: "That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, freely without any denial, and speedily without delay, according to the law of the land." In North Carolina's constitution of the same year it is provided: "That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." In Pennsylvania's constitution of the same year it is provided: "Nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers." In Virginia's constitution of the same year it is provided: "That no man be deprived of his liberty, except by

ing to the nature of the case; the duel, ordeal, or compurgation, in criminal cases, the duel, witnesses, charters, or recognition, in property cases." Bigelow, *History of Procedure*, 155, n.

[1] Pollock and Maitland, *Hist. of English Law*, 2d ed., i, 173.

[2] Cf. McGehee, *Due Process of Law*, 6.

the law of the land or by the judgment of his peers." In Vermont's constitution, drafted in 1777 and affirmed in 1779, it is provided: "Nor can any man be justly deprived of his liberty, except by the laws of the land or the judgment of his peers." In South Carolina's constitution of 1778 it is provided: "That no freeman of this state shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled, or in any manner disseized or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land." In Massachusetts' constitution of 1780 it is provided that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." In the New Hampshire constitution of 1784 the same provision is repeated, word for word.

Chapter 39 embodied in Fifth Amendment,

When the Fifth Amendment was adopted, the essence of chapter 39 passed into the Federal Constitution in this form: "No person shall be . . . deprived of life, liberty, or property, without due process of law." In construing that clause the Supreme Court has said: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Carta. Lord Coke, in his commentary on those words,[1] says, they mean due process of law. The constitutions which had been adopted by the several states before the formation of the Federal Constitution, following the language of the Great Charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.'"[2] When at a later day the essence of chapter 39 passed into the Fourteenth Amendment in this form, "nor shall any state deprive any person of life, liberty, or property, without due process of law," it wrought a revolution in American jurisprudence. As the Supreme Court has expressed that fact in a leading case: "While it has been a part of the Constitution, as a restraint upon the power of the states, only a few years, the docket of this Court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens

and in the Fourteenth.

[1] 2 *Inst.* 50.

[2] Murray *v.* Hoboken Land and Improvement Co., 8 How. 272.

of life, liberty, or property without due process of law." [1] Since that declaration was made in 1877 the volume of serious litigation in the Supreme Court, involving those very questions, has continued to grow until it may be said, without exaggeration, that the main business of that Court now is to construe and enforce chapter 39 of the Great Charter as a national limitation upon the action of state courts, state executives, and state legislatures. In the case just cited the Court said: "The prohibition against depriving the citizen or subject of his life, liberty, or property, without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866. The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown."

A manifest historical error.

The great Court has, however, fallen in that case, as in the preceding case of Murray *v.* Hoboken Land and Improvement Co., into a manifest historical error when it assumes that the due process of law clause, as it appears in the Fifth and Fourteenth Amendments, should be construed as it was understood in England in 1632 when Coke's "Second Institute" — a commentary on Magna Carta — was published. The fact cannot be ignored that Coke, who as a Privy Councillor sat in the Star Chamber, died September 3, 1634, while the entire code of Star Chamber law and High Commission law was in full force. During the one hundred and forty-two years that intervened between Coke's death and the severance of the English colonies in America from the mother country, what may be called the ancient Constitution of England, first clearly defined in Magna Carta, was transformed into the modern Constitution through the Revolutions of 1640 and 1688. The reformed and invigorated constitutional system that stands out after those revolutions was a vastly wider and more complete fabric of liberty under law than that existing in Coke's time. Those revolutions brought into being many new constitutional principles,

Results of the Revolutions of 1640 and 1688.

[1] Davidson *v.* New Orleans, 96 U. S. 97.

most of which passed into American law, of which Coke never heard. As a practical illustration reference may be made to the recent notable discussion that occurred in Twining *v.* New Jersey,[1] in which the Court had occasion to consider the origin of the constitutional right to an exemption from compulsory self-incrimination. Down to Coke's death that compulsory principle was a part of the Star Chamber code. Not until after the Revolution of 1688, and as a consequence of it, was that Star Chamber process extinguished.[2] The exemption from compulsory self-incrimination, to which the Revolution of 1688 gave birth, had become so clearly defined in English constitutional law, prior to the separation of the American colonies from the mother country, that the bills of rights of our first state constitutions bristle with definitions of it. That exemption was first stated in a dogmatic form in the bills of rights of the state constitutions of 1776. We have the Court's word for it that "the exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against one's self, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits." That exemption only became "universal in American law" because it had become firmly fixed in English law between 1688 and 1776. The new constitutional principle, forbidding compulsory self-incrimination, that passed into all or nearly all of our original state constitutions, is highly typical of the fact that the bills of rights of those first state constitutions are but epitomes, and the very best epitomes of the English constitutional system as it stood forth after the Revolutions of 1640 and 1688. The draftsmen of those constitutions would have recoiled with horror at the thought that they were founding American constitutional law upon the ancient English Constitution as it existed in 1632 — with the Star Chamber and High Commission intact — and not upon the reformed English Constitution, as Blackstone described it in the first book of his famous "Commentaries," put in their present form in 1758. Burke, in his famous conciliation speech made in the House of Commons in 1775, said: "I hear that they [English booksellers] have sold nearly as many of Blackstone's 'Commentaries' in America

Exemption from self-incrimination.

Blackstone not Coke the guide.

[1] 211 U. S. 78.

[2] Stephen, *History of Criminal Law*, i, 440.

as in England. General Gage marks out this disposition very particularly in a letter on your table."

Those "Commentaries" were taught at William and Mary College, before the Revolution of 1776, by Chancellor Wythe, who numbered Marshall, Jefferson, and Monroe among his students. American lawyers of that day, as of this, knew Coke through Blackstone, with his doctrines amended and expanded by the changes the Revolutions of 1640 and 1688 had wrought in the ancient Constitution of 1632. Thus trained and influenced, the founders of this Republic epitomized in our first state constitutions the modern English Constitution, as Blackstone had defined it.

Modern English system embodied in state constitutions.

The documentary evidence upon that subject is so overwhelming as to preclude every other hypothesis. It being thus certain that the English constitutional law that passed into our first state constitutions was drawn from the reformed English system as Blackstone defined it in 1758, is it conceivable that the English constitutional law now embodied in our federal fabric was drawn from the ancient and unreformed English system as Coke described it in 1632, before the first meeting of the Long Parliament, whose work is an immortality? If anything in the history of any country is certain, it is that the essence of the English constitutional system as reformed by the Revolutions of 1640 and 1688, and as defined by Blackstone in 1758, passed into our first state constitutions, which were the filter-beds through which the essence of the reformed English system passed into the existing Constitution of the United States. Therefore, in construing the due process of law clause, as it appears in the Fifth and Fourteenth Amendments, nothing but confusion and inaccuracy can result from the acceptance of the false standard contained in a misleading anachronism. We should have nothing to do with Coke's sketch of the ancient English Constitution as it existed in 1632 — we should turn instead to the true fountain opened for us by Blackstone in 1758.

Justice Matthews' correct view.

In Hurtado *v.* California,[1] Mr. Justice Matthews was the first to perceive that the rule of construction, *based on English constitutional theory as it existed in Coke's time*, was at once unsound and unpractical. In rejecting that idea, accepted

[1] 110 U. S. 528.

without due consideration by Justices Curtis and Miller, he said: "It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, *the words of Magna Carta stood for very different things* AT THE TIME OF THE SEPARATION OF THE AMERICAN COLONIES *from what they represented originally.* . . . In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, *and the provisions of Magna Carta were incorporated into bills of rights*"; that is, into bills of rights of the first state constitutions, because there were no other bills of rights. In these golden sentences Mr. Justice Matthews solved the problem by announcing that the Court, when construing the due process of law clause as it appears in the Fifth and Fourteenth Amendments, should take that formula with the meaning annexed to it in English constitutional law, "*at the time of the separation of the American colonies*," as contra-distinguished from the meaning annexed to it in 1632, when Coke's "Second Institute" was published. That conclusion he greatly strengthened by the statement that "the provisions of Magna Carta were incorporated into bills of rights," that is, into the bills of rights of our first state constitutions. Thus a new and unassailable historical test was laid down as a guide whenever a particular law or procedure is drawn in question on the ground that it is wanting in due process of law, and that new test received emphatic confirmation when the Court, speaking through Mr. Justice Gray in Lowe *v.* Kansas,[1] said: "Whether the mode of proceeding prescribed by this statute, and followed in this case, was due process of law, depends upon the question *whether it was in substantial accord with the law and usage of England* BEFORE THE DECLARATION OF INDEPENDENCE, and in this country since it became a nation, in similar cases."

Justice Gray's view.

That emphatic refusal to recognize as a correct historical test the condition of English constitutional law as it existed in 1632 was repeated in no uncertain terms in Twining *v.* New

[1] 163 U. S. 81.

Justice Moody's view.

Jersey,[1] when the Court, speaking through Mr. Justice Moody, said: "Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. *If that were so, the procedure of the first half of the seventeenth century would be fastened upon American jurisprudence like a straight-jacket, only to be loosed by constitutional amendment.*"

After reading the foregoing, what student of American constitutional law can fail to perceive that the clue to the labyrinth consists in a correct understanding of what the English Constitution really was when its basic principles passed into the state constitutions adopted in 1776 and shortly thereafter.

Origin of representative government.

During the five centuries that preceded the granting of the Great Charter, the principle of representation was actively employed in the popular courts of the hundred and shire in which the English people were trained in the art of self-government. From the very beginning in the hundred court appeared the reeve and four select men from each township within the hundred;[2] in the shire court, like representatives appeared from each township within the shire,[3] while the twelve senior thegns appeared as a representative body in the courts of both hundred and shire.[4] The marvel is that not until after five centuries of such training did it occur to any one that just as the reeve and four select men could be sent to speak for the township in the county court, two knights elected in that court could be sent to speak for the county in the national assembly at Westminster. The first expression of that

Writs of 1213.

idea is found in 1213, when John called a council at Oxford, to which the sheriffs were directed to summon, besides the armed force of knights, four discreet men from each shire, to share in the King's deep speech touching the affairs of his kingdom, to form, in short, the first representative Parliament.[5]

[1] 211 U. S. 101.

[2] In that arrangement appears the earliest form of the representative principle. Hen. I, vii, secs. 4, 7. Stubbs, *Const. Hist.*, i, 103, note 1.

[3] That fact, left questionable in the laws, is proven by the later practice. Hen. I, vii, secs. 4, 7; li, sec. 2. See also Bigelow, *Hist. of Procedure*, 133.

[4] *Æthelred*, iii, sec. 3; *Cod. Dipl.*, iv, 137.

[5] "Quatuor discretos homines de comitatu tuo illuc venire facias ad nos ad eundem terminum ad loquendum nobiscum de negotiis regni nostri." *Lords' Report*, App. i, p. 2.

To Henry III's Parliament of 1254 the chosen knights from the shires were summoned for the first time since the reign of John.[1] In order to conclude the arrangements embodied in the "Mise of Lewes," and in order to gain a broad popular basis for his government, Simon of Montfort, in 1265, issued the writ for his famous Parliament, to which were summoned not only two discreet knights from each shire, but also, for the first time in English history, two representatives from the cities and boroughs.[2] A period of thirty years then elapsed before the experiment was repeated; the representatives of the cities and towns were not again summoned until Edward's Great Parliament of 1295, in which the estate system in England reached for the first time its full and final development. That Parliament — in which the baronage appear in person and the clergy and the commons, each as an estate of the realm, in the persons of their chosen representatives — completes the transition in the constitution of the national assembly from a feudal council to a council of estates.[3] The time had now come when the supreme question, involving the right of the nation to tax itself, — a right which the barons at Runnymede had clearly defined, but which the struggles of eighty years had failed to confirm, — had to be settled once and for all between the nation and the King. When, in 1297, Edward I precipitated the conflict by attempting to tax the nation without its authority, it met him in arms under the leadership of the earls Bigod and Bohun, who demanded the confirmation of the charters, supplemented by certain additional articles, all of which were confirmed by the King at Ghent on November 5.[4] The new articles, thus solemnly made a part of the Constitution, not only denounced all of the unauthorized taxation, but they also provided that, with certain exceptions, no taxes should thenceforth be imposed without the common consent of the realm and to the common profit thereof. Thus by the reincorporation into the charters

Writs of 1254.

Writs of 1265.

Great Parliament of 1295.

Transition from feudal council to council of estates.

*Confirmatio cartarum*, Nov. 5, 1297.

[1] For the writ see Ibid. 13.

[2] For the writ, see Ibid. 33; *Select Charters*, 415.

[3] From that time the attendance of representatives from both shires and towns has been continuous or nearly so; both knights and burgesses are summoned *ad faciendum quod tunc de communi consilio ordinabitur in præmissis. Lords' Report*, App. i, p. 66.

[4] *Fœdera*, i, 80. The charters had been previously confirmed by *inspeximus* on the 12th of October. *Fœdera*, i, 879; *Statutes of the Realm*, i, 114–119.

of these vital limitations upon the royal right of taxation, which for more than eighty years had been omitted from them, the prolonged struggle inaugurated by the barons at Runnymede ended at last in a completely successful consummation. The exclusive right of the national assembly to authorize taxation was now fully and finally recognized, save in so far as that right was limited by the proviso, "saving the ancient aids and prizes due and accustomed." [1]

Two stages of growth.

Thus it appears that the history of the representative system is divided into two epochs: first, that in which the reeve and four men appear as representatives of the township in the courts of the hundred and the shire; second, that in which the representatives of the shires and towns appear in national parliaments. At the time fixed in the writs the lords spiritual and temporal, together with the representatives from the shires and towns, were expected to appear before the King at Westminster or at any other place he had seen fit to designate. Not until the reign of Edward I did Westminster become in the full sense of the term the seat of government; and not until the reign of Edward III was Parliament definitely divided into two houses. In 1377 Sir Thomas Hungerford was chosen Speaker, the first to whom the title and position were definitely assigned; while the Chancellor, not necessarily a peer, usually presided in the House of Lords.[2] The clergy of the two provinces, refusing to be jointly assembled as an estate of Parliament, continued to tax themselves in their provincial convocations until after the restoration of Charles II, when, in 1664, by a mere verbal agreement between Archbishop Sheldon and Lord Chancellor Clarendon, an arrangement was made under which the clergy waived their right to tax themselves, and agreed to be assessed by the laity in Parliament, gaining thereby the new right of voting at the election of the members of the House of Commons by virtue of their ecclesiastical benefices.[3] Thus the fact was

Parliament divided into two houses.

Sheldonian compact of 1664.

[1] By that proviso the King refused to surrender his old exchequer rights over the settlers on his domain lands, and over the tolls traditionally fixed (*custuma antiqua*), those, namely, on wool, hides, and leather. See Gneist, *Eng. Parliament*, note to p. 136 (Shee's trans.).

[2] *Rot. Parl.*, ii, 374. See May, *Parl. Practice*, 23 (and note 4), 49, 243, 246.

[3] The results of this silent revolution, called "the greatest alteration in the Constitution ever made without an express law," were distinctly recognized in an Act of Parliament passed in the following year (16 and 17 Par., ii, c. 1).

fixed that the Parliament should consist of two houses instead of three. At first the Commons were permitted to participate only in taxation, a burden that drew after it the right to participate in legislation. Finally Parliament as a whole established its right to control the royal administration, to impeach the Ministers, and to depose the King himself in the last resort. The deposition of Edward II was settled by the Parliament of 1327, and in 1399 the same procedure removed Richard II, who was succeeded by Henry IV, the first king of the House of Lancaster.[1] During its domination it was that the immature parliamentary system collapsed through a set of causes that have a history of their own. As the parliamentary system was the outcome of the estate system, the collapse of the one naturally followed the collapse of the other. Under the favorable conditions thus presented, by the paralysis of the constitutional forces by which it had been so long held in check, the monarchy, upon the accession of Edward IV, lifted up its head, and casting off the fetters by which it had been bound by the parliamentary system on the one hand and by the system of royal administration on the other, entered upon a fresh career of autocracy which was not destined to be broken until the days of the Stuart kings.

Accession of House of Lancaster.

Accession of House of York.

A point has now been reached from which it is possible to review the advance made by Parliament during the period that intervenes between the Norman Conquest and the end of the fourteenth century. During that period the feudal councils that gathered around the Norman and Angevin kings, with authority too vague and shadowy for precise definition, are gradually transformed into an assembly of estates, which wins not only the right to participate in taxation and legislation, but to supervise and control the entire system of national administration, and, in the last resort, to depose the King himself. At the end of the period we find that the sum of governmental power originally vested in the King in Council has been vastly reduced by the operation of two distinct processes of subtraction. In the first place, by the growth out of the continual council — which soon came to be known as the *Curia Regis* — of the common-law courts of King's Bench, Common Pleas, and

Origin of the great courts of law and equity.

[1] Upon the whole subject, see *The Origin and Growth of the Eng. Const.*, i, 428–515.

Exchequer, the greater part of the judicial work of the Council was permanently transferred to three distinct tribunals, each devoted to the hearing of a definite class of causes. And when at a later day out of the residuum of judicial power retained by the Council was developed the equitable jurisdiction of the Chancellor, the judicial functions of the Crown were confined within a still narrower circle. By the transfer thus brought about of the greater part of the judicial business originally dispatched by the King in Council to the great courts of law and equity, the central administration, in its judicial aspect, was transformed into a government of law as distinguished from a government of functionaries.[1] Out of the fusion between the central administration of justice vested in the *Curia Regis* with the local administration vested in the shire-moots, grew the modern courts of assize, in which the itinerant justices still preside, but in which the general assembly of the shire is represented only by the grand and petty jurors who are summoned by the sheriff for the trial of civil and criminal cases. Only by working out that process of fusion between the system of royal law radiating from the *Curia Regis*, with the system of popular law immemorially administered in the local courts, can we understand the history of the typical circuit court existing in every state of the American commonwealth, in which all cases at common law, civil and criminal, are disposed of by a judge with the aid of juries, grand and petty. By the side of that system we have also reproduced the equitable jurisdiction of the English Chancellor, sometimes vested in a separate tribunal, but generally in a court having common-law powers.

Equitable jurisdiction of the Chancellor.

Origin of courts of assize

While the law courts were thus drawing to themselves the control of the bulk of the judicial work originally belonging to the King in Council, the assembly of estates was struggling, as heretofore pointed out, to draw to itself the exclusive control of the legislative, taxative, and fiscal business of the kingdom. But before the national assembly was in a position to essay so great a task, a reorganization had first to be effected in its own

Powers retained by the King in Council.

[1] "The guarantee of the supremacy of the law leads to a principle which, so far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which, nevertheless, has been in our system of liberty the natural production of a thorough government of law as contra-distinguished to a government of functionaries." Lieber, *Civil Liberty and Self-Government*, 91.

constitution, a result brought about by the building-up alongside of the older feudal council of a new popular body composed of representatives of the shires and towns. In the Parliament thus reconstructed, the Commons soon ceased to be mere auxiliaries of the baronial body, — they became the more active and aggressive force in the new combination. And yet, when a summing-up is made of the results of the two processes of subtraction, the important fact remains that neither process was exhaustive. At the end of the struggle in which Parliament did its utmost to win the exclusive control of legislation as well as taxation, there still remained in the hands of the King in Council an undefined reserve of legislative power for a long time exercised in the making and revoking of a class of temporary enactments known as ordinances. After the jurisdiction of the four great courts at Westminster had been fully established, an undefined reserve of judicial power still remained to the King in Council, a reserve out of which at a later day grew that famous engine of the York and Tudor monarchy finally known as the Star Chamber.

Ordinances.

When, after the collapse of the immature parliamentary system in the storm and stress of the civil war, the House of York ascended the throne in the person of Edward IV, he was careful to stimulate the judicial powers of the Council, which he finally converted into an engine of tyranny. So far as constitutional history is concerned, the short reign of Richard III is a mere episode. The real successor of Edward IV, in a constitutional sense, is Henry VII. The despotic policy founded by Edward was continued by Henry and his successors, who systematized and enforced it as a permanent system of government. From the accession of Henry VII to the Revolution of 1640 the history of the Council is the history of the monarchy. During that period of a century and a half, both the law courts and the Parliament crouched at the feet of its paramount authority. The soundest critics agree in the conclusion that the famous Act of 3 Henry VII, c. 1, was only intended to invigorate, by parliamentary sanction, the ancient prerogative criminal jurisdiction of the Crown, which, as early as the reign of Edward III, we hear of the "chancellor, treasurer, justices, and others exercising in the '*chambre des estoiles*' at Westminster." The powers of the special committee or court, organized under the

York and Tudor monarchy.

The Star Chamber.

Act of 3 Henry VII, c. 1, after maintaining a separate existence for about fifty years, fell back, toward the close of the reign of Henry VIII, to the general body of the Council. The Act of 31 Henry VIII, which gave to royal proclamations the force of law, provided that offenders against them might be punished by the ordinary members of the Council, together with certain bishops and judges, "in the star chamber or elsewhere." [1]

From Edward IV to Wolsey.

From the accession of Edward IV down to the fall of Wolsey, the settled policy of the Crown had been to discourage parliamentary action, by calling the estates together only on rare occasions, and by confiding as far as possible the entire central administration of the state to the Privy Council. That policy

Cromwell's new policy.

Cromwell suddenly reversed by the constant employment of Parliament as a tool through whose acts the papal supremacy was overthrown and the church stripped at once of its estates and independence. Emboldened no doubt by the fact that the Lords were still a subservient and spiritless body that cowered at the feet of the King, and that the Commons were largely made up of members nominated directly or indirectly by the Privy Council, Cromwell, so far from shrinking from an appeal to the estates, was keen to call them together, year after year, and to force upon their attention every possible question to which he desired to add the forms of legality or the apparent sanction of popular approval.

Collapse of representative government on the Continent.

With the close of the Middle Ages, every effort that had been made in the direction of representative government on the Continent of Europe came to an end. Then it was that the free constitutions of Castile and Aragon were overthrown by Charles V and Philip II; then it was that the States-General of France met for the last time (1614) before their final meeting (1789) upon the eve of the French Revolution.[2] But the new system of absolutism reëstablished by the House of York and perpetuated by that of Tudor did not aim at the abolition of the older forms of constitutional life by which the monarchy had been fettered for more than a century; it simply

[1] For the literature touching the history of the Star Chamber, see *The Origin and Growth of the Eng. Const.*, ii, 23–27 and notes.

[2] Cf. Robertson's *Charles V*, iii, 434; Watson's *Philip II*, iii, 223; Prescott's *Philip II*, first chapter of book vi; Sismondi, xiii, 342; Macaulay, *History of England*, i, 46–48; Freeman, *Growth of the English Constitution*, 139.

strove to extinguish forever the vital spirit which in the better days had made them actual restraints on the royal authority.

English Renaissance.

That vital spirit would, no doubt, have been extinguished had it not been for the fact that just as the long night of political reaction, coextensive with the York and Tudor monarchy, began to settle down like a blight upon the growth of the English Constitution, the dawn of the Renaissance began to break on the life of the English people. While Edward IV and Henry VII were fastening upon the island kingdom the system of absolutism which had begun to prevail throughout the Continental nations, the main body of the people were beginning to be stirred by the spirit of that new and marvelous era of national awakening generally known as the English Renaissance, — a term which must not be confined to the mere revival of learning, but so expanded as to embrace the whole process of mental and material development that brought to the English people its new conceptions of philosophy and religion, its new understanding of government and law, its reawakened interest in the arts and sciences, its new-born activity in commerce and manufacture, as well as that spirit of discovery and adventure that widened its destiny through conquest and colonization in another hemisphere. During the period in which Edward IV was overawing the law courts and trampling upon the Parliament, the "shining seed-points of light" out of which the new life was to spring were being sown amid the embers of the dying mediævalism. The reign of monarchy in England, as in the rest of Europe, brought with it peace, which gave a marked impetus not only to agriculture and manufacture, but to foreign commerce. The shores of the Mediterranean no longer marked the limits of the maritime world; the dominion of the seas had already begun to pass from the Italian seaports to the nations bordering on the Atlantic seaboard; the great era of discovery and conquest had now come, in which English seamen and soldiers were soon to bear their part. During the sixteenth century the Cabots, Gilbert, Barlow, Armidas, Drake, and Raleigh braved every hardship and faced every danger in the prosecution of American discovery; and in the next age their work was crowned by the brave English hearts who at last overcame the terrors of the wilderness, and laid the foundations of the great republic beyond the sea.

Real meaning of the term.

Reign of monarchy brought with it peace.

Era of discovery and conquest.

Stuarts and Revolution of 1640.

To the Stuarts the conciliar system of the Tudors passed unimpaired just at the moment when that system was becoming unequal to the task of governing a nation that had already entered upon a career of marvelous development. James I and Charles I, so far from accepting the mission of reform thus naturally arising out of changed conditions, not only continued the system of government by councils the Tudors had bequeathed to them, but attempted to intensify its absolutism both in theory and practice. What the constitution of the Council was in the days of Elizabeth it remained down to the meeting of the Long Parliament, and during that period its powers were stretched to a greater extent than had ever been known before. Between the reviving parliamentary system, animated by the new and aggressive spirit of liberty that passed into the Commons from the Renaissance and the Reformation, and the waning system of government by councils, animated by the spirit of absolutism, more than ever intense, derived from James, a conflict was inevitable. That conflict was a long and bitter one. Not until after the completion of two revolutions was the English nation able finally to subject the conciliar system, as organized by the Tudors and enforced by the Stuarts, to the parliamentary system as it exists in modern times.

Conflict between conciliar and parliamentary systems.

Two famous trading charters.

"Within the period of ten years, under the last of the Tudors and the first of the Stuarts, two trading charters were issued to two companies of English adventurers. One of these charters is the root of the English title to the East, and the other to the West. One of these companies has grown into the Empire of India; the other into the United States of North America." [1] The claim of the English Crown to the territory upon which the English settlements in America were made was based upon the voyages of the Cabots made along the American coast during the years 1497 and 1498. The first patent issued to the Cabots — the oldest surviving document connecting the old land with the new [2] — gave to the patentees the right to sail under the royal ensign, and to set up the royal banner in any newly discovered land as lieutenants and vassals of the King. The inchoate right

[1] Bryce, *The American Commonwealth*, i, 416.

[2] That document, which is dated 5th March, 1495 (1496 new style), is printed in the Hakluyt Society's edition of the *Divers Voyages*, and in Rymer's *Fœdera*.

thus acquired by discovery at the close of the fifteenth century did not ripen into a perfect title until early in the seventeenth, when the permanent English settlements in America were made. In order to regulate the competition for the possession of the new world, and to avoid conflicting settlements, and consequent war with each other, the European nations agreed "to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." [1] The principle thus established assumed that the Indian tribes found on the soil were mere temporary occupants. According to the theory of the English Constitution the title to all newly discovered lands accrued to the King in his public and regal character, and the exclusive right to grant them resided in him as a part of the royal prerogative: "Upon these principles rest the various charters, and grants of territory made on this continent." [2] It is not therefore strange that when James I executed the great title-deed of April 10, 1606, he should have conveyed the heart of the new world to certain patentees just as if it were a royal manor. The granting clause of the charter is, "To be holden of us, our heirs and successors, as of our manor at East-Greenwich, in the County of Kent, in free and common soccage only, and not in capite." [3] By the charter in question two companies were formed, and to the "First Colony," or London Company, as it is usually called, he granted a tract of land fronting one hundred miles on the Atlantic coast and extending one hundred miles into the interior, to be located at such point as the company might select between the thirty-fourth and forty-first parallels of north latitude. To the "Second Colony," or the Plymouth Company, he granted a similar tract of land, to be located between the thirty-ninth and forty-fifth parallels of north latitude. In the intervening belt both companies had the right to

English title to new world.

Rule regulating acquisition.

James's charter of April 10, 1606.

London Company.

Plymouth Company.

[1] Marshall, C. J., in Johnson *v.* McIntosh, 8 Wheat. 573.

[2] Taney, C. J., in Martin *et al. v.* The Lessee of Waddell, 16 Peters, 409.

[3] See Poore's *Charters and Constitutions*, part ii, p. 1892. It is also contained in Stith and in Hazard's *Hist. Collections*.

locate, provided that neither should settle within one hundred miles of the other. To an uncivilized country, such as America then was, English subjects carried with them, as their birthright, the laws of England existing at the time the colonization took place.[1] The foundation of the entire fabric was English law, the original charter providing "that all and every the persons being our subjects, which shall dwell and inhabit within every or any of the said several colonies and plantations, and every of their children, which shall happen to be born within any of the limits and precincts of the said several colonies and plantations, shall have and enjoy all liberties, franchises, and immunities, within any of our other dominions, to all intents and purposes as if they had been abiding and born within their own realm of England or any other of our said dominions." [2] In May, 1607, the London Company made the settlement at Jamestown, the first permanent settlement made by Englishmen on the soil of the new world. In 1609 a separate charter was granted to the London Company [3] which gave to it half the continent; and within its larger domain it had power to govern colonies, subject to the sovereignty of the King and their rights as British subjects.[4] Out of the vast expanse thus granted to the London Company were carved the domains finally distributed between the five southern colonies of Virginia, Maryland, North Carolina, South Carolina, and Georgia. Under a license obtained from the Plymouth Company a Puritan settlement was established in 1620 at Plymouth, in the southeastern part of what is now the State of Massachusetts, by a band of separatists from the English Church, who had for a time dwelt in Holland, prior to their final departure from the mother country to their New England home. North of the Plymouth settlement was established at a

English law the basis.

London Company's separate charter of 1609.

Domains of the five southern colonies.

[1] In a civilized country occupied by Englishmen, the laws prevailing at the time of conquest continue until an alteration is made. Cf. Taylor, *The Science of Jurisprudence*, 489, and notes.

[2] *Charters and Constitutions*, part ii, pp. 1891–1892.

[3] Ibid. 1893.

[4] The new grant extended from Point Comfort "all along the Sea Coast to the Northward, two hundred miles," and "along the Sea Coast to the Southward, two hundred miles," and "up into the Land throughout from Sea to Sea, West and Northwest," including all the islands within one hundred miles of the coast. See map of Virginia's claim under charter of 1609, in *Higher History of the United States*, by H. E. Chambers, p. 84.

little later day another, by men of the same general creed, but of a broader culture, which in March, 1629, was incorporated by royal charter under the name of the "Governor and Company of Massachusetts Bay in New England" — a charter obtained in order to put at rest any difficulty as to the title of the colony originally derived from a grant made to it by the Council of New England.[1] After establishing the colony of Massachusetts Bay, into which the Plymouth settlement was finally incorporated, the Plymouth Company, in June, 1635, surrendered its charter to the Crown, and out of the territory which had been granted to it were carved the domains finally distributed between the four northern colonies of Massachusetts, Connecticut, Rhode Island, and New Hampshire. Out of the march or borderland, fixed between the territories of the two original companies by the original grant of 1606, were carved the domains of New York, New Jersey, and Pennsylvania, from the last of which was clipped the State of Delaware. In this wise the heart of North America, which passed to the English Crown by the right of discovery, was granted, as any royal manor might have been granted, first, to the two trading companies created by the charter of 1606, and, after their dissolution, to the thirteen colonies that united in the making of the Declaration of Independence.

Domains of the four northern colonies.

Domains of the four middle colonies.

Having now examined the title to the soil upon which the English colonies in America were planted, some reference must be made to the character of the corporations created by the Crown under whose ordinances the settlers organized self-governing communities. In England and the United States, as at Rome, all corporate organization rests upon state authority; and everywhere the ideal conception of the juristic person is expressed in substantially the same terms. By an English court we are told that "a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of law. It has no soul, neither is it subject to the imbecilities of the body";[2] by an American, that "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses

Colonies mere corporations created by the Crown.

[1] For the history of these settlements, see *Nar. and Crit. Hist.*, iii, 219–384.

[2] The case of Sutton's Hospital, 10 Rep. 32 b.

Creation and dissolution of corporations.

only those properties which the charter of its creation confers upon it, either expressly or as an incident to its very existence."[1] In England, the consent of the Crown is absolutely necessary to the erection of a corporation, either impliedly or expressly given. "A corporation may be dissolved, (1) by an act of Parliament, which is boundless in its operations; (2) by the natural death of all its members, in case of an aggregate corporation; (3) by surrender of its franchises into the hands of the sovereign, which is a kind of suicide; (4) by forfeiture of its charter, through negligence or abuse of its franchises, in which case the law judges that the body politic has broken the conditions upon which it was incorporated, and thereupon the incorporation is void."[2] The soil upon which the English colonies in America were planted was granted to them as *terra regis* by the English Crown; it was not granted to them as folkland by the English Parliament.[3]

Soil granted as *terra regis*.

The charters under which the colonial governments were organized were likewise royal grants; they were not concessions from the English legislature. In contemplation of English law the whole group of colonial governments in America created or confirmed by royal charters were mere corporations created by the King, and subject like all others of their kind to his visitorial power, and to the power of his courts to dissolve them in a proper case presented for the purpose. In 1624 the charter of the London Company, under which the settlement at Jamestown had been made, was brutally revoked through a legal judgment, "one of the earliest of those efforts in which the Stuart reigns were so fruitful, efforts to wrest the process of law to the arbitrary purposes of the Crown";[4] and in 1684 the charter of Massachusetts was canceled by the crown judges in a proceeding begun by *scire facias*.[5] Until some cause of forfeiture arose, the grant, as between the Crown and the patentees, was irrevocable, — it being the settled doctrine of English law that after a grant of corporate powers made by the Crown had been once accepted, the Crown could not resume the grant without the consent of

Revocation of charter of London Company, 1624;

and of Massachusetts, 1684.

[1] Dartmouth College *v.* Woodward, 4 Wheat. 636.

[2] Blackstone's *Com.*, i, 461.

[3] See *Essays in A. S. Law*, 91–93, 98–100.

[4] Doyle, *English Colonies in America, Virginia*, etc., 182.

[5] See Palfrey's *New Eng.*, iii, 391–393.

those in whom its privileges had been vested.[1] The irrevocable rights thus acquired by the colonists as against the Crown were revocable, however, at the hands of the Parliament. Under the theory of the English Constitution, then as now, "Its power is, legally speaking, illimitable. It may create and abolish and change, at its pleasure, with or without the assent of the people or corporation to be thereby affected." [2] Subject to this illimitable power of the Imperial Parliament, the English Crown organized upon the soil of the new world a group of colonial governments, whose differences of internal organization, and whose greater or less dependence upon the Crown, distinguished them broadly from each other.

The omnipotent Parliament.

Those colonies to which the Crown gave most sparingly the right to regulate their own affairs are generally known as royal colonies, — a typical representative of which may be found in the colony of Virginia, whose early constitutional growth happily illustrates the general process of evolution through which the most dependent of the English settlements in America was rapidly transformed from a servile corporation into a self-governing state organized upon the model of the English kingdom. The government of the London Company, whose charter granted by James I in 1606 contained the germs of the Virginia constitution, was vested in a resident council of thirteen appointed by the Crown, who were authorized to choose their own president, and to govern "according to such laws, ordinances, and instructions as shall be in that behalf given" by the King. The resident council was subject to the control of the superior council in England, which was also subject to the ultimate ordaining power of the King in Council.[3] In the spring of 1609 this complex system of royal government was relaxed in favor of local control through a reorganization of the company, whereby the non-resident council was abolished and the government of the colony vested in a single resident council nominated by the King in the first instance, but vacancies in which were afterwards to be filled by a vote of the whole company. Under this council — which was authorized to

The royal colonies — Virginia.

Ordaining power of the King in Council.

[1] Cf. Dillon, *Municipal Corporations*, i, 109, 2d ed., and cases cited.

[2] Ibid. 110.

[3] As to the distinction between the ordaining power of the King in Council and the law-making power of the King in Parliament, see *The Origin and Growth of the Eng. Const.*, i, 496–497.

choose a governor, and "to make, ordain, and establish all manner of orders, laws, directions, instructions, forms and ceremonies of government, and magistracy, fit and necessary for and concerning the government of the said colony" [1] — the Virginian settlement became almost an independent and self-governing community. In 1612 still further concessions were obtained in favor of the company; and in 1619, under its instructions, the governor summoned an assembly of burgesses from the several hundreds, counties, and plantations embraced within its limits, which met on the 30th of July in the chancel of the church at James City or Jamestown.[2] Thus was constituted the first representative legislative assembly ever held in America, which was composed of twenty-two burgesses from the eleven several towns, plantations, and hundreds, styled boroughs. "The local assemblies in which the colonists were represented 'were not formally instituted, but grew up by themselves, because it was in the nature of Englishmen to assemble'"; [3] or, as Hutchinson has expressed it, "This year [1619] a House of Burgesses *broke out in* Virginia." [4] The history of the Virginian settlement down to this point clearly illustrates how rapidly even a royal colony slipped from the actual grasp of the Crown, and how, in its internal organization, it involuntarily reproduced the outlines of the ancient Constitution. At the base of its local organization we find the hundred and the shire; in the colonial governor we have a reflected image of the kingship; in the Royal Council — the House of Lords; in the House of Burgesses — the House of Commons. As heretofore pointed out, the foundation of the whole fabric was, by the terms of the charter, English law. In spite of the wanton proceedings by which its charter was annulled by a judgment of the King's Bench in 1624, and its affairs transferred to the Privy Council, the Virginian settlement survived as a royal colony, and its government as finally organized was vested in a representative assembly chosen by the people, in a royal council nominated by the Crown, and in a royal governor armed with a veto power upon legislation. Such

First American representative assembly, 1619.

The colony as a reproduction of the parent state.

[1] Language of the second charter. See *Charters and Constitutions*, part ii, p. 1899.

[2] See *Nar. and Crit. Hist.*, iii, 143.

[3] Maine, *Pop. Government*, 223.

[4] See Seeley, *The Expansion of England*, 67.

was the general structure of a royal colony,[1] a type which, originally represented by Virginia alone, came to be the prevailing type before the severance from the mother country.

The charter colonies — Massachusetts.

In the same sense in which Virginia stands as the typical representative of the royal colonies, Massachusetts stands as the typical representative of the opposite class, — consisting of Massachusetts, Rhode Island, and Connecticut, — generally known as the charter colonies, despite the fact that their foundations were laid without the aid or sanction of charters at all. As Tocqueville has expressed it, "in general, charters were not given to the colonies of New England till their existence had become an established fact. Plymouth, Providence, New Haven, Connecticut, and Rhode Island were formed without the help, and almost without the knowledge of the mother country." [2] It may therefore be said that their free constitutions were older than their charters. The royal charter of 1629, that organized the group of New England settlements into a corporation under the title of the "Governor and Company of Massachusetts Bay," and then authorized them to regulate their own affairs as a practically independent and self-governing community, was in fact nothing more than a recognition of a preëxisting state of things.[3] The government of the Massachusetts colony was vested by the charter in the governor, deputy governor, and eighteen assistants, all of whom were to be annually elected by the freemen. The only dependence under which the colony labored at the outset grew out of the fact that it was subject to the control of a corporation in England comprised of those by whom its organization had been brought about. With the extinction of that corporation through the transfer of its charter to America, that tie was

Her charter a recognition of preëxisting conditions.

[1] See Chalmer's *Introduction*, i, 13–16.

[2] *Democracy in America*, i, 45. Connecticut has been graphically described as "a state which was born, not made, which grew up by natural accretion of townships, which formed its own government, made its own laws, engaged in its own alliances, fought its own wars, and built up its own body, without the will of King, Kaiser, or Congress, and which, even at the last, only made use of the royal authority to complete the symmetry of the boundaries it had fairly won for itself." See Johnston, "The Genesis of a New England State," *Johns Hopkins Studies*, 1st series, xi, 6.

[3] "But, if it be not a paradox to say so, the constitution of Massachusetts was older than the existence of the colony." Doyle, *English Colonies in Am., Puritan*, etc., i, 104.

severed, and Massachusetts became, as far as a colony could become, an independent commonwealth, and continued to be such down to the annullment of its charter in 1684 by *scire facias*. By the new charter granted it in 1691 its original independence was much curtailed by a provision which gave to the Crown the right to appoint a royal governor with an absolute veto on legislation. Both Rhode Island and Connecticut preserved their free charters unaltered down to the Revolution; and even then — so completely adequate were they to all their wants — they did not change them. The charter granted to Connecticut by Charles II in 1662 was continued as her organic law until 1818; while the charter granted in 1663 to Rhode Island was continued as her organic law down to 1842.[1]

Charters of Rhode Island and Connecticut retained.

Between the royal and charter governments stood a middle class known as proprietary, which approached nearer to the latter than the former in respect to their freedom from royal control. The proprietary system, which grew out of the idea that the work of colonization could be better accomplished by private individuals than by corporate enterprise, rested upon a series of grants made by the Crown to one or more proprietors of vast tracts of land coupled with an almost unlimited power of government and legislation. The first proprietary government that bore fruit was that of Maryland, whose constitutional history begins with the grant, made in 1632 to the first [2] Lord Baltimore, of the tract of land lying to the north of that actually settled by the Virginia Company. By that grant the proprietor and his successors were not only invested with the title to the land, but they were also authorized to make laws with the assent and advice of the majority of the freemen or their representatives, free from all real dependence upon royal authority.[3] The details of political organization were in a great measure confided to the discretion of the proprietor, whose original conception of a constitution consisted of a governor, council, and primary assembly, — a veritable Old-English

The proprietary system — Maryland.

A county palatine.

[1] See *Charters and Constitutions*, part i, p. 252; part ii, p. 1603.

[2] Before the patent passed the seals George Calvert died, and the charter was granted to his son Cecilius, second Lord Baltimore.

[3] "The province was made a county palatine; and the proprietary was invested with all the royal rights, privileges, and prerogatives which had ever been enjoyed by any Bishop of Durham within his county palatine." *Nar. and Crit. Hist.*, iii, 520.

gemote, — in which every freeman had the right to represent himself and to vote. Gradually as the primary plan grew inconvenient it was supplanted by a representative system, and in 1647 the governing body was divided into two chambers, the lower consisting of an elective house of burgesses, the upper of councillors and of those speedily summoned by the proprietor.[1]

Primary plan supplanted by representative system.

In the grant to the proprietors of Carolina we find the same absoluteness of sovereignty over the land, and the same freedom from royal control, with more careful provision, however, in favor of the freeholders, who were endowed with a charter right [2] to participate in legislation. Here it was that the proprietors attempted to create a political fabric through the aid of Locke, — a philosopher of the Social Contract School, — whose Fundamental Constitutions quickly illustrated how vain it was to attempt to govern Englishmen by a paper constitution [3] whose complicated and artificial details offended the national instinct by departing from the primitive tradition. When the proprietary system is viewed as a whole, the great landlords to whom the original grants of land and political authority were made must be looked upon as the mediums or conduits through which the Crown conveyed to the colonists the boon of local self-government. The colonies of Maryland, New York, New Jersey, New Hampshire, Pennsylvania (including Delaware), Carolina, and Georgia were at the outset proprietary. But as the proprietors one by one surrendered their charters to the Crown, they were all transformed into royal colonies, except Maryland, Pennsylvania, and Delaware, which remained proprietary down to the Revolution — subject to the charter right of their governors to veto legislation.

Carolina, and Locke's Fundamental Constitutions.

Having noted the external relations of the colonies to Crown and Parliament, something must be said of their internal organization. The statement has been made already that out of a union of townships grew what was finally known in England as the hundred; out of a union of hundreds grew the modern

England's strength as a colonizing nation.

[1] As to the history of the early assemblies, see *Nar. and Crit. Hist.*, iii, 528–531, 536. See also Doyle, *Virginia*, etc., 286–291.

[2] See *Charters and Constitutions*, part ii, p. 1392.

[3] For the first draft of the constitutions, see *Carroll*, ii, 361; for the later modifications, see the *Shaftesbury Papers*, under the years in which they were issued.

shire; out of a union of modern shires grew the English kingdom. The power to subdue and settle a new country, and then to build up a state by that process of aggregation, constitutes the strength of the English nation as a colonizing nation. By that process, capable under favorable geographical conditions of unlimited expansion, has been built up the Federal Republic of the United States. "In America . . . it may be said that the township was organized before the county, the county before the state, the state before the union."[1] In the effort to re-create the process through which the English colonies in America were made, we must keep steadily in view the process through which their prototype in Britain was made. The elements of organization in both were the same, and the general principle upon which such elements coalesced was substantially the same. It may be stated as a general rule that the English colony in America, like the English state in Britain, represented an aggregation of counties, and that each county represented an aggregation of townships. The hundred — the intermediate division between the township and the county — appeared in the structure of some of the colonies, but, being unnecessary to the local wants of the new land, passed out of view.[2] In some instances the colony was formed by the coalescence of the local communities before a charter was granted; in others the charter was granted first and the colony then subdivided into districts as the local communities were organized. The fruit of both processes was the same — a dependent state — subdivided into counties and townships as the organs of its local administration. The most striking fact that stands out in the history of these local communities in the new land is that wherever the one became the active agent of local administration, the other, while it did not cease to exist, became dormant. In America the county and the township did not appear as co-working agents dividing the duties of local administration in anything

Political aggregation in America.

County and township as agents of local government.

[1] Tocqueville, *Democracy in Am.*, i, 49. "Upon the township was formed the county, composed of several towns similarly organized; the state, composed of several counties, and, finally, the United States, composed of several states; each organization a body politic, with definite governing powers in a subordinate series." Address of Mr. Lewis A. Morgan, before Am. Assoc. for the Adv. of Science, Boston, Aug. 26, 1880.

[2] The hundred existed in Virginia, Maryland, and maybe elsewhere. See Ingle, "Local Inst. of Va.," *J. H. Studies*, 3d series, ii–iii, 41. Bacon, *Laws of Maryland*, 1638.

like equal proportions. In the northern colonies, where population became dense, and where the active spirit of the English yeoman and trader reproduced a system of political life as closely organized as it was vigorous, the township became the active organ of local administration, for the simple reason that its compact organization was better adapted than that of the county to the local wants of New England. In the southern colonies, where population was more sparse, and where the southern planter reproduced the more tranquil life of the English country gentleman who had little or nothing to do with the life of towns, the county became the active organ of local administration, for the reason that it satisfied all of the political wants of a rural population.[1] While the township was thus overshadowed in the southern colonies by county organization, the New England county maintained nothing more than a shadowy existence as a local district for certain judicial purposes.[2] In the middle colonies the two opposing systems fought for the mastery, and the result was a composite system that approached nearer than either to the original model by dividing between the town and county, in something like equal proportions, the duties of local government.

In the northern colonies the township, in the southern the county, the active agent.

Composite system in middle colonies.

During the ten centuries that intervened between the Teutonic conquest and settlement of Britain and the making of the English settlements in America, the *mark*, which reappeared in Britain as the *tun* or township, passed through a notable transformation. In the process of English feudalization the township was transformed into the manor of the lord, and the once free townsmen became the lord's tenants, while the greater part of the ancient jurisdiction of the tun-moot passed to the manorial courts. And more than this, the township in the home land became involved in ecclesiastical as well as feudal relations. As a division in the territorial organization of the church, the township became the parish, and as such its boundaries were used to define the jurisdiction of a single priest: "all business that is not manorial is dispatched in vestry meetings, which are, however, primarily meetings of the township for

The township in different aspects.

The parish and its vestry.

[1] Mr. Freeman, in writing to the author on this subject, said: "I found in Virginia people spoke of the *county* as they do here. In New England the county seemed lost. There the *town* was the thing when the *city* had not swallowed it up."

[2] See Washburn, *Judicial Hist. of Mass.*, 31, note 1.

church purposes." [1] In that way the tun-moot had ceased to exist as a single assembly, and its jurisdiction had been split up and absorbed by the parish vestry and manorial courts long before the emigration to America began. It is therefore a very remarkable fact in the history of institutions that when the settlers of New England reproduced the township in the new world, they should have reproduced it in its original form, unfettered by the feudal and ecclesiastical restraints in which it had been encaged for centuries. As a brilliant American scholar has expressed it, the colonists "were severed now from church and from aristocracy. So they had but to discard the ecclesiastical and lordly terminology, with such limitations as they involved, and reintegrate the separate jurisdictions into one, — and forthwith the old assembly of the township, founded in immemorial tradition, but revivified by new thoughts and purposes, gained through ages of political training, emerged into fresh life and entered upon a more glorious career." [2] The government of the New England town, like that of the Old-English township, is vested in the town-meeting; and "a New England town-meeting is essentially the same thing as the Homeric *ἀγορή*, the Athenian *ἐκκλησία*, the Roman *comitia*, the Swiss *Landesgemeinde*, the English folk-moot." [3] The fact that the township, stripped of its feudal aspect as the manor, and of its ecclesiastical aspect as the parish, reappeared in its primitive form upon the soil of New England, must not, however, lead to the inference that it did not elsewhere appear in each of its discarded characters. The evidence as to the origin and structure of old Maryland manors is of a very clear and satisfactory character. There even the court baron was not wanting. From Bozeman we learn that "one or two rare instances occurred of the holding of both courts baron and courts leet in two distinct manors." [4] In St. Clement's manor

Townships in New England.

Manors in Maryland.

[1] Stubbs, *Const. Hist.*, i, 85.

[2] Fiske, *American Political Ideas*, 49.

[3] Freeman's "Int. to Am. Inst. Hist.," *J. H. Studies*, 1st series, i, 16.

[4] *History of Maryland*, ii, 581. Therein we are told that "a court baron was held at the manor of St. Gabriel on the 7th of March, 1656, by the steward of the lady of the manor when one Martin Kirke took of the lady of the manor in full court, by delivery of the said steward, by rod according to the custom of the said manor, one messuage, having done fealty to the lady, was thereby admitted tenant." (MS. extracts from the records.)

a court leet was held at intervals between 1659 and 1672, as appears from its manuscript records now in the possession of the Maryland Historical Society.[1] The evidence is equally clear as to the existence in New York of the manorial system in its Dutch aspect.[2] In Virginia the colony was first created as an entirety and then subdivided into self-governing districts as rapidly as they were demanded by the growth of population. When the county had finally become crystallized, it was divided into parishes. While, as a general rule, the parish was a division of the county for religious purposes, its governing body, the vestry, had considerable authority in civil affairs. The vestrymen were originally elected by the parishioners themselves under the supervision of the sheriff; but as they were chosen for an indefinite term, and as it was provided by statute in 1661–62 that, in the event of the death or removal of any one of them, his place should be filled by the vestry itself, the governing body of the Virginia parish ceased to be representative, and like its English parent, hardened into a close corporation.[3]

and in New York.

Virginia parishes.

Such was the general nature of the process of reproduction that resulted in the creation of the thirteen English colonies in America, which, upon the severance from the mother country, rose to the full stature of sovereign states. In coming into being they originated a new principle of constitutional law, America's first contribution to the Science of Politics. As the colony was created by a royal charter that called into being a subordinate law-making body, that body could neither violate the terms nor transcend the powers of the instrument to which it owed its existence. In colonial times "questions sometimes arose . . . whether the statutes made by these assemblies were in excess of the powers conferred by the charter; and, if

America's first contribution to political science.

[1] These records, presented to the society by Col. B. U. Campbell, are printed as an appendix to *Old Maryland Manors*, 31–38.

[2] See "Dutch Village Communities on the Hudson River," Elting, *J. H. Studies*, 4th series, i, 12–16; O'Callaghan, *Hist. of New Netherlands*, i, 320.

[3] See Rev. P. Slaughter's *Hist. of Bristol Parish*, 2d ed., 4; Channing, *Town and County Govt.*, 43, 48; Ingle, *Local Institutions of Va.*, 81–83. For the history of the hardening process in England, see Sir T. Erskine May, *Const. Hist.*, ii, 461. A partial remedy for that abuse of parochial government in England was supplied in 1831 by Sir J. Hobhouse's Vestry Act, 1 and 2 Will. IV, c. 60.

Invalidity of colonial statutes.

the statutes were found in excess, they were held invalid by the courts, that is to say, in the first instance by the colonial courts, or, if the matter was carried to England, by the Privy Council." [1] After the severance from the mother country, that power to annul a statute, originally vested in the Privy Council, was simply assumed by the supreme courts of the emancipated states. On May 10, 1776, the Continental Congress recommended to the several conventions and assemblies of the colonies the establishment of independent governments "for maintenance of internal peace and the defense of their lives, liberties, and properties"; [2] and before the end of that year the greater part of the colonies had adopted written constitutions in which the powers of the state were restrained by a set of limitations in favor of the rights of the citizen as those rights were then defined in English constitutional law. But no one of those constitutions gave to the supreme court of a state, in express terms, the right to annul an invalid enactment. The judges established that right by a process of reasoning of which the following is perhaps the earliest example. In Com. *v.* Caton,[3] a case that came before the Court of Appeals of Virginia in November, 1782, Wythe, J., said: "Nay, more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say to them here is the limit of your authority; and hither shall you go, but no further." Rhode Island retained the charter granted to her in 1663 as her constitution down to 1842; and in Trevett *v.* Weeden an act was declared void in 1786 because it impaired the right of trial by jury guaranteed by that charter.[4] In Bayard *v.* Singleton,[5] decided by the Supreme Court of North Carolina in 1787, an act was likewise annulled because destructive of the right of trial by jury; and in Bowman *v.* Middleton,[6] decided by the Supreme Court of South Carolina in 1792, it was held that an act passed by the colonial legislature, in 1712, was *ipso facto* void because

State constitutions of 1776.

Earliest cases declaring state statutes void.

[1] Bryce, *The Am. Commonwealth*, i, 243.

[2] See *Charters and Constitutions*, i, 3.

[3] 4 Call (Va.), 5–21.

[4] See Cooley, *Const. Lim.*, p. 26, note 1, for comments on that case.

[5] 1 N. C. 42 (1 Martin, pt. i, p. 48).

[6] 1 Bay, 252.

in contravention of Magna Carta. Thus the principles became fundamental in American constitutional law (1) that every state legislature is endowed by its very nature with all the omnipotence of the English Parliament, save in so far as that omnipotence is restrained by the express terms of constitutional limitations; [1] (2) that whenever the legislature of a state violates such limitations, its supreme court possesses the inherent and implied power to annul its act for that reason. A written constitution, as a complete system of limitations upon the powers of a state to invade the "rights of man," is an invention that arose out of the politics of the French Revolution; but the right of a court to annul the act of a state when, in its judgment, the limitations imposed by the constitution have been exceeded, is purely an American invention. That invention, originating with the states, as above set forth, was lifted into a higher sphere when the existing Federal Constitution was adopted. Without any express authority whatever from that Constitution, the Supreme Court of the United States, by repeating the process of reasoning originally employed by Chancellor Wythe, reached the conclusion, for the first time in the world's history, that a judicial tribunal can put the stamp of nullity on a national law whenever in its judgment it exceeds the limits of the national Constitution.

Constitutional limitations on legislative power.

Invention originated with the states.

The fact that the soil upon which the English colonies in America were planted came to them through royal grants,[2] the fact that every form of political organization established thereon rested upon royal charters, were the foundation-stones upon which the colonists gradually built up, in the light of their actual experience, their theory of the political relations that bound them to the mother country. Their rights as Englishmen, endowed with "all the liberties, franchises, and immunities of free denizens and natural subjects," flowed from their charters, which, as between themselves and the Crown, were irrevocable though not non-forfeitable contracts. The earliest form of direct legislative control to which any of the colonists were subjected, in the form of ordinances or instruc-

American theory of colonial rights

[1] See Cooley's *Const. Lim.*, 107 (5th ed.), and cases cited; Mangan *v.* State, 76 Ala. 60; Davis *v.* State, 68 Ala. 58.

[2] "The title to the English colonies was not in the people of England nor in the state, but in the Crown, and descended with it. The Crown alone could sell or give away these lands." *Nar. and Crit. Hist.*, vi, 3.

tions for their government, emanated, not from the law-making power of the King in Parliament, but from the King in Council. And at a later day when the colonial assemblies began the work of legislation on their own account, the validity of their enactments depended, not upon the approval of the English Parliament, but upon that of the royal governor, who stood as the ever-present representative of his royal master. With the founding of the colonies, and with the organization of their political systems, the Crown had everything to do, the Parliament practically nothing. Apart from the control which it had exerted from the beginning over their external affairs in matters of trade and navigation, the colonies, prior to the latter part of the eighteenth century, had not been drawn within the widening circle of its imperial authority. The whole tendency of their early experience was to lead the colonies to believe that the Crown was the only tie that bound them to the mother country; that to each one of them the King stood in the direct relation of chief executive; that to him alone duties were due; and that the only proper mediums of communication between the Crown and colonies were the colonial parliaments. In their local legislatures the colonists had learned how to tax themselves, and how to regulate their home affairs through laws of their own making.[1] Losing sight of the fact that England had grown into an empire since the work of colonization began, the colonists clave to the earlier conception which regarded the home Parliament simply as the legislative organ of the United Kingdom. As such they held that it had no right to invade the jurisdictions of their colonial assemblies in order to legislate directly upon their internal concerns.

The Crown regarded as the only tie that bound the colonies to England.

English theory of colonial rights.

While remoteness and self-interest were alike intensifying in the colonial mind this reasonable yet narrow conception, the growth of English dominion was leading English statesmen at home to elaborate a theory which, in the gorgeous language of Burke, clothed the English Parliament with an "imperial character, in which, as from the throne of Heaven, she superintends all the several inferior legislatures, and guides and controls them all without annihilating any."[2] In the

[1] That is well put by Fiske in *The Critical Period*, 63.

[2] Speech on American taxation, April 19, 1774.

hands of a practical tax-loving statesman like Grenville this imperial theory was not confined to mere supervision; in such hands it was held to mean that the Imperial Parliament could at any moment override the acts of the colonial assemblies, without consulting their wishes at all, and tax and legislate for the people of Massachusetts and Virginia just as it could for the people of Kent and Middlesex. Out of the conflict that finally arose between the English and colonial theories as to the practical omnipotence of the Imperial Parliament over self-governing communities beyond the four seas, grew the war of the Revolution, and the severance of the colonies from the mother country.[1]

Out of the conflict grew the war of the Revolution.

[1] See Green's statement of the conflicting theories, *Hist. of the Eng. People*, iv, 226–230. While the conflict of theory as to the jurisdiction of the Imperial Parliament was the visible and technical cause of separation, was not the real cause that stated by Turgot, who said that "colonies are like fruits, which cling to the tree only till they ripen. As soon as America can take care of itself, it will do what Carthage did." *Œuvres de M. Turgot* (Paris, 1808–11), ii, 19, 66.

# CHAPTER IV

## FEDERALISM AS A SYSTEM OF GOVERNMENT

Effects of geography on federation.

THE physiography of North America predetermined the fact that the thirteen emancipated colonies were to unite in a federal and not in a consolidated state. The group of colonial commonwealths, as they appear upon our Atlantic seaboard toward the close of the eighteenth century, were, in internal organization, a substantial reproduction of that older group of heptarchic kingdoms as they appear in Britain in the ninth.

Britain and America contrasted.

And yet, despite that likeness, the younger group in their efforts at union were unable to look to the older group for light or guidance, for the reason that the widely different geographical conditions by which they were respectively surrounded had prescribed for each a widely different destiny. Confined within the narrow and impassable bounds of an island world, it became the manifest destiny of the English states in Britain, advancing in the path of political aggregation, to coalesce in the formation of a single consolidated kingdom. Situated on the shores of an almost boundless continent, it became the manifest destiny of the English states in America, advancing in the path of political confederation, to unite in the flexible bonds of a federal system capable of almost unlimited expansion.[1]

A federal union defined.

In order the more clearly to comprehend the process through which federalism has finally taken on in America its most perfect form, it will be helpful to glance for a moment at its history as a system of government prior to the making of its last and most successful experiment. A federal union may be defined to be the joining-together of sovereign states under any form of confederation more permanent than a mere alliance, wherein each state surrenders a part of its sovereignty for the common good of all, without the surrender of its individual right to regulate such internal affairs as concern it only. It is the very opposite of that kind of union which is brought about

[1] See Fiske, *Am. Political Ideas*, chap. iii.

by the incorporation or fusion of two or more states or cities into a single body with equal rights common to all. The ideal of a perfect federal government may be defined to be one which is but a single state in all matters that concern the federal body as a whole, and yet a group of states perfectly independent in all matters which concern each member of the group as a local self-governing community. To the ideal federal government, the federal commonwealths that have actually existed in history can only be regarded as more or less close approximations. Out of the entire group of such commonwealths four have been specially commended for study to students of the history of federal government, for the reason that their constitutions illustrate the closest approaches that have so far been made to the perfect federal ideal. These four are the Achaian League (B.C. 281–146), the Confederation of the Swiss Cantons (from 1291); the Seven United Provinces of the Netherlands (1579–1795); and the United States of North America (from 1789).[1] In considering the internal structures of these more perfect federal systems a sharp distinction must be drawn between those in which the central power deals only with the government of states as states, and those in which the central power acts directly upon all citizens. According to the manner in which the central power exercises its special functions federal governments are usually divided into two classes. Those in which the central power is only authorized to issue requisitions to the state government for each to carry out are known as "confederated states," while those which are sovereign within their spheres, and which can enforce such sovereignty directly upon every citizen, are known as "composite states." [2]

An ideal federal government.

Four notable approaches.

Confederated states.

Composite states.

When we turn to the Mediterranean world in which the Science of Politics was born, we there find the dominant political idea embodied in the independent city — the city-commonwealth — which stood toward all other cities as a sovereign

The Greek city-commonwealth.

[1] See Freeman, *History of Federal Government*, i, 5, 6, 11, 12, and notes.

[2] As to that distinction, see J. S. Mill, *Rep. Govt.*, p. 301; Prof. Barnard, *Lectures on American War*, Oxford, 1861, pp. 68–72. Tocqueville says the government of the United States is neither exactly national nor exactly federal: it is a novel thing, — "*un gouvernement national incomplet.*" See upon the whole subject, *The Federalist*, nos. xxxviii, xxxix.

state whose internal affairs were regulated by its own domestic constitution. Such was the only conception of the state with which Aristotle, the acknowledged founder of political science,[1] was acquainted; and in obedience to his practical temper he made a collection called the "Constitutions,"[2] supposed to have contained a description of the codes of a hundred and fifty-eight city-states bounded by their own walls, and like the mediæval republics of Italy, living for centuries in sight of each other without a thought of union except through conquest of the weaker by the stronger. Not until the Macedonian supremacy raised up a military empire on their own frontier, stronger and far more dangerous than that of Persia, did the statesmen of Greece learn the necessity of confederation for the safety of their isolated and self-governing city communities. Of such unions the two most celebrated were the Achaian and the Ætolian leagues. The scholars who have in our own time passed beyond the Greece of Thucydides (471–400 B.C.) to the Greece of Polybios[3] (about 203–121 B.C.), who have passed beyond the period in which the independent city-commonwealth was the dominant political idea into the less brilliant period of Hellenic freedom occupied by the history of Greek federalism, have at last put before us in a tangible form the history of at least one ancient federal league whose internal structure entitles it to be ranked among "composite states." Careful analysis of the constitution of the Achaian League seems to have clearly established the fact that its government was really national; that there was an Achaian nation, with a national chief, a national assembly, and national tribunals; that every Achaian citizen owed a direct allegiance to the central authority as a citizen of the league itself, and not merely of one of the cities that composed it.[4] The supreme power was vested

Aristotle's "Constitutions."

The Greece of Polybios.

Achaian League.

[1] See Pollock, *Hist. Science of Politics*, I.

[2] The fragments that remain have been collected and annotated by Neumann, and are contained in Bekker's Oxford edition of Aristotle.

[3] Mr. Freeman, after referring to Grote's depreciation of *The Greece of Polybios* (xii, 527–530), laments the fact that his great work "lies almost untouched in our universities." *Fed. Govt.*, pp. 219–227, note I. For Mommsen's estimate of Polybios as an historian, see *Römische Geschichte*, ii, 427.

[4] "The Achaian League was, in German technical language, a *Bundesstaat*, and not a mere *Staatenbund*." Freeman, *Hist. of Fed. Govt.*, i, 259, citing Helwing, 237.

in a single primary assembly that met at stated intervals, and in a general (Στρατηγός) elected for a stated term like the American President, who was assisted by ten magistrates, who formed around him a permanent cabinet or council. Although the central assembly did undoubtedly levy federal taxes (αἱ κοιναὶ εἰσφοραι),[1] the probabilities are that such taxes were collected not by federal tax collectors, but through the requisition system under which each city was permitted to raise its quota through its own local machinery. The Achaian League can therefore only hold its place among "composite states" by virtue of the fact that its national government acted directly on the citizen, and not by reason of the fact that it had passed beyond the requisition stage to that in which a federal government collects its taxes through the direct agency of its own officers. And yet, whatever general resemblance may be traced between the Achaian League (the product of a union of city-commonwealths) and the United States (the product of the union of modern states), the fact remains that the history of the one had no direct or conscious influence upon the making of the other. In 1787 the history of Greek federalism was really a sealed book. Such scanty knowledge as the founders did possess seems to have been chiefly drawn from the little work of the Abbé Mably, "Observations sur l'histoire de Grèce."[2] The "History of Greek Federations," first written by Edward A. Freeman, did not appear until the publication of the first volume of his great "History of Federal Government" in 1863. The lack of knowledge on the subject is frankly confessed by Madison and Hamilton who have told us in the "Federalist"[3] that "could the interior structure and regular operation of the Achaian League be ascertained, it is probable that more light might be thrown by it on the science of federal government than by any of the like experiments with which we are acquainted." The only federal governments with whose internal organizations the builders of our Federal Republic were really familiar, and whose histories had any practical effect upon their work, were those that had grown up between the Low-Dutch communities at the mouth of the Rhine, and between the High-Dutch communities in the mountains of

Federal taxes and requisition system.

No conscious influence on American federalism.

Founders only familiar with Teutonic leagues.

[1] *Pol.*, iv, 60.

[2] See *Federalist*, nos. xix, xx.

[3] No. xviii.

Switzerland, and upon the plains of Germany.[1] Down to the making of the second Constitution of the United States the Confederation of Swiss Cantons, the United Provinces of the Netherlands, and the German Confederation really represented the total advance made by the modern world in the structure of federal governments. Such advance was embodied in the idea of a federal system made up of a union of states, cities, or districts, representatives from which composed a single federal assembly whose supreme power could be brought to bear not upon individual citizens, but only upon states or cities as such. The fundamental principle upon which all such fabrics rested was the requisition system, under which the federal head was simply endowed with the power to make for federal purposes requisitions for men and money upon the states or cities composing the league, while the states alone, in their corporate capacity, possessed the power to enforce them.

All operated on states or cities, not on individuals.

During the immense interval that divides the history of the ancient Greek leagues from that of the comparatively modern Teutonic leagues, the ancient conception of the state as a city-commonwealth gave way to the modern conception of the state as a nation occupying a definite area of territory with fixed geographical boundaries, the state as known to modern international law.[2] That conception gradually arose out of the settlements made by the Teutonic nations upon the wreck of the Roman Empire. At the time Tacitus wrote, the typical Teutonic tribe (*civitas*) was a distinct commonwealth, the largest and highest political aggregate. Not until nearly a century later were these scattered tribes gathered into larger wholes—into nations.[3] When that stage was reached, when tribes were fused into the higher political unit, the nation, the primitive Teutonic conception of the state, widened into its full and final development. But another stage of growth had yet to be passed before the new unit, which thus arose out of an aggre-

Modern state as the nation.

Teutonic tribes gathered into nations.

[1] See *Federalist*, nos. xix, xx.

[2] Taylor, *International Public Law*, chap. ii, "The Modern State as the Nation."

[3] Zeuss, *Die Deutschen und die Nachbarstämme*, pp. 303, 304. In the Mediterranean peninsulas the product of a union of tribes was a city-commonwealth, — in Teutonic lands the product of a union of tribes was not a city at all, but a nation. "The Teutons passed from the tribal stage into the national stage without ever going through the city stage at all." *Comparative Politics*, 101.

gation of tribes, reached the full modern conception of the state as a nation possessing a definite portion of the earth's surface with fixed geographical boundaries. The fact must be borne in mind that the primary bond uniting the people who composed a Teutonic nation was a personal one; the national king was first among the people, the embodiment of the national being, but not the king of a particular area or region of territory. The idea of sovereignty was not associated in the Teutonic mind with dominion over a particular portion or subdivision of the earth's surface. The Merovingian line of chieftains were not Kings of France, they were Kings of the Franks; Alaric was King of the Goths wherever the Goths happened to be, whether upon the banks of the Tiber, the Tagus, or the Danube.[1] The leading idea which seems to have prevailed among the conquering nations that settled down upon the wreck of Rome was that they were simply encamped on the land whose possession they had won. The conception of sovereignty the Teutonic nations brought with them from the forest and the steppe was distinctly tribal and national, and not territorial. The general nature of the transition whereby the primitive notion of tribal sovereignty was gradually superseded by that of territorial sovereignty has been described as a movement from personal to territorial organization;[2] from a state of things in which personal freedom and political rights were the dominant ideas to a state of things in which those ideas have become bound up with and subservient to the possession of land.[3] The most striking single result of the transition — which, for the want of a better term, has been called "the process of feudalization"[4] — is that the elective chief of the nation, the primitive embodiment of the tribal sovereignty, is gradually transformed into the hereditary lord of a given area of land. The new conception of sovereignty, which thus grew out of "the process of feudalization," did not become established, however, until after the breaking-up of the Empire of Charles the Great, out of whose fragments have arisen most of the states of modern Europe. The completion of

Tribal sovereignty.

Territorial sovereignty the outcome of "the process of feudalization."

[1] Maine, *Ancient Law*, p. 100; Freeman, *Norm. Conq.*, i, 53.

[2] Palgrave, *Eng. Commonwealth*, pt. i, p. 62.

[3] Stubbs, *Const. Hist.*, i, 166.

[4] Maine, *Village - Communities*, lecture v, "The Process of Feudalization."

the transition is marked by the accession of the Capetian dynasty in France. When the hundred years' struggle between the Dukes of Paris and the descendants of Charles the Great ended in the triumph of Hugh Capet, he not only assumed the dynastic title of King of the French, but he also styled himself King of France.[1] Hugh Capet and his descendants were kings in the new territorial sense; they were kings who stood in the same relation to the land over which they ruled as the baron to his estate, the tenant to his freehold. The form thus assumed by the monarchy in France was reproduced in each subsequent dominion established or consolidated; and thus has arisen the state system of modern Europe in which the idea of territorial sovereignty is the basis of all international relations.[2] Until we have grasped the modern conception of the state as the nation, it is impossible to differentiate the Teutonic leagues based on that conception from the ancient Greek leagues based on that widely different conception of the state known as the city-commonwealth. The modern conception of the state, the basis of the existing international system, may be said to be the outcome of the "process of feudalization" through which the Teutonic nations passed after their settlements within the limits of the Roman Europe.

Form assumed by the monarchy in France reproduced.

With the foregoing clearly in view it is easy to explain the principles upon which federal states are classified by writers on international law. The less strictly organized union or league resting on the requisition system — of the type prevailing prior to the making of the second Constitution of the United States — is usually styled a confederated state, or in German technical language a *Staatenbund*. The leading characteristic

How federal unions are classified.

*Staatenbund.*

[1] "The important change occurred when the feudal prince of a limited territory surrounding Paris began, from the accident of his uniting an unusual number of sovereignties in his own person, to call himself King of France, at the same time that he usurped from the earlier house their dynastic title of Kings of the French." Maine, *Ancient Law*, p. 104. Mr. Freeman, in criticising that statement, wrote to the author as follows: "I should not say that what Maine says about *Rex Francorum* and *Rex Franciæ* was other than right in a general way. Those things came in gradually. *Roi de France* comes in pretty early — as early as Wace. I doubt whether *Rex Franciæ* is ever used, till Henri IV's *Rex Franciæ et Navarræ* as a formal Latin title." See also *Norman Conquest*, i, appendix, note M, p. 395.

[2] Upon the whole subject of "territorial sovereignty," and its relations to modern international law, see Maine, *Ancient Law*, 99–108.

of such a confederation, so far as its internal relations are concerned, is that the state does not entirely surrender to the central power its right of dealing directly with other states. Only after reserving to itself the right thus to dispose of a certain part of its foreign affairs is the control over the remainder surrendered to the central authority. Originally both the Swiss and German confederations belonged to that class. While the final outcome of the struggle of the Swiss Cantons to emancipate themselves from the toils of the feudal system, begun early in the fourteenth century, was assured by the accession to the league in 1513 of the last of those thirteen German Cantons which were to constitute its central membership down to the French Revolution, it was not until its recognition by the great powers in the Treaty of Westphalia in 1648 that the Swiss Confederation became in the eyes of public law a sovereign state.[1] Under the Constitution of the league as it existed prior to 1798 the several cantons retained the right to make separate treaties with foreign powers and with each other; and under the new Act of Confederation, concluded in August, 1815, between twenty-two cantons, the right of each was reserved to conclude any alliance which was not prejudicial to the rights of the general Confederation or of any of its members. In the same way the Germanic Constitution as modified at the Peace of Westphalia, which converted the Empire into a confederation of the loosest sort,[2] gave to the members of the Diet, by whose votes the Emperor was to be governed, the right not only to contract alliances among themselves but with foreign princes, provided no prejudice resulted thereby to the Emperor and Empire. Under the Constitution of the new German Confederation, embraced in the final act of the Congress of Vienna (1815), the right was still retained by each state to declare and carry on war and to negotiate peace with any foreign power to the Confederation, and to make its own alliances, provided no injury was thereby inflicted upon the Confederation itself, or upon any of its members.[3]

Swiss Confederation.

Germanic Confederation.

[1] See Wilson, *The State*, secs. 379, 507, 508.

[2] See Bryce, *Holy Roman Empire*, 324.

[3] Each state also retained its rights of legation as to foreign powers and to its co-states. Klüber, *Oeffentliches Rechts des Deutschen Bundes*, pp. 137–143. A good commentary on the Final Act may be found in Twiss, i, 71–74.

United Provinces of the Netherlands.

The Low-Dutch League, with whose infirmities the founders were specially familiar, was that known as the Seven United Provinces of the Netherlands, a *Staatenbund* (1579–1795), composed of seven coequal and sovereign states, each state or province representing an aggregation of equal and independent cities. The sovereignty of the league was vested in the States-General, consisting usually of about fifty deputies appointed by the provinces, which was armed with the power to make treaties and alliances, to make peace and war, to raise armies and equip fleets. But no federal taxes could be levied. When an attempt was made to establish a general tax, to be administered by the federal authority, it failed. The league had no resource but the requisition system; it could only ascertain quotas and demand contributions; and when the sovereign powers were to be exercised by the States-General, unanimity and the sanction of their constituents were necessary. "It was long ago remarked by Grotius that nothing but the hatred of his countrymen to the House of Austria kept them from being ruined by the vices of their Constitution. The union of Utrecht, says another respectable writer, reposes an authority in the States-General, seemingly sufficient to secure harmony, but the jealousies in each province render the practice very different from the theory. The same instrument, says another, obliges each province to levy certain contributions; but this article never could, and probably never will be executed, because the inland provinces, who have little commerce, cannot pay an equal quota. In matters of contribution, it is the practice to waive the articles of the Constitution. The danger of delay obliges the consenting provinces to furnish their quotas without waiting for the others, and then to obtain reimbursement from the others by deputations which are frequent, or otherwise, as they can. The great wealth and influence of the province of Holland enable her to effect both those purposes. It has more than once happened that the deficiencies had to be ultimately collected at the point of the bayonet." [1] The Abbé Mably says that "Under such a government the union could never have subsisted, if the provinces had not a spring within themselves, capable of quickening their tardiness,

States-General and its powers.

Criticism of Grotius;

of the Abbé Mably.

[1] *The Federalist*, no. xx, entitled, "Example of the United Netherlands." Hamilton and Madison (Ford ed.), 119–123. See also 236, 503.

and compelling them to the same way of thinking. This spring is the Stadtholder," who in his political capacity had authority to settle disputes between the provinces when other means failed; to assist at the deliberations and conferences of the States-General, to give audiences to foreign ambassadors, and to keep agents for his particular affairs at foreign courts. In his military capacity he was commander-in-chief of the federal troops, with a general power to direct military affairs; while in his marine capacity he was admiral-general, with a corresponding power to direct naval forces and other naval affairs. The weakest part of this Constitution, perhaps, was that which required unanimity as a condition precedent to the exercise of the treaty-making powers. In that way, in 1726, the Treaty of Hanover was delayed a whole year; in 1648 the treaty in which the independence of the Netherlands was involved was concluded without the consent of Zealand; and in 1688 the States-General, overleaping their constitutional bonds, concluded a treaty of themselves at the risk of their heads. It is not strange therefore that Sir William Temple, who was himself a foreign minister, should say in his notable "Observations upon the United Provinces of the Netherlands," that foreign ministers elude matters taken *ad referendum*, by tampering with the provinces and cities. By reason of such disabilities federalism, as a system of government, stood very low in the estimate of mankind at the close of the eighteenth century. After the flight of the Stadtholder to England in 1795, the republican party in the provinces so reorganized the government as to bring it into harmony with that of Paris. The Batavian Republic came into being in close alliance with France under a new constitution that swept away the ancient system of representative government, the stadtholderate, and the offices of captain and admiral-general. A fair and open representation was then established. Our first Federal Constitution was patterned after the ancient and discredited type as embodied in the constitutions of the Confederation of Swiss Cantons and the United Provinces of the Netherlands. From the inaugural address of President John Adams, 1797, we learn that "the Confederation which was early felt to be necessary was prepared from the models of the Batavian and Helvetic Confederacies, the only examples which remain with any detail

Stadtholder and his powers.

"Observations" of Sir Wm. Temple.

and precision in history, and certainly the only ones which the people at large had ever considered. But reflecting on the striking difference in so many particulars between this country and most where a courier may go from the seat of government to the frontier in a single day, it was then certainly foreseen by some who assisted in Congress at the formation of it that it could not be durable." [1]

[1] *Messages and Papers of the Presidents*, 1789–1897, i, 228. In commenting on the Swiss Confederacy in the *Federalist*, no. xix, Hamilton and Madison say: "They are kept together by the peculiarity of their topographical position; by their individual weakness and insignificance; by the fear of powerful neighbors, to one of which they were formerly subject."

# CHAPTER V

## AMERICAN CONFEDERATIONS FROM 1643 TO 1777

United Colonies of New England.

JUST as the pressure of a common danger compelled the Greek cities to draw together in leagues for defensive purposes, a like pressure forced the English colonies in America to unite for common defense against the hostile savages in their rear, and also against the hostile colonists of other European nations, whose interests conflicted with their own. The difficulties and dangers growing out of that condition of things brought about the formation of the first American Confederacy. No sooner had the four New England colonies of Massachusetts, Connecticut, New Haven, and Plymouth completed their existence than their disputes between themselves, and their hostilities with the Dutch in New Netherland, growing out of encroachments on their territory, with the French in Canada, arising out of conflicting grants, and with the Indians, impelled them, "encompassed by people of several nations and strange languages," to enter "into a consociation for mutual help and strength." The federal constitution of this short-lived league, formed upon the requisition plan, was embodied in formal articles of confederation,[1] eleven in number, which were agreed upon at Boston, in May, 1643. It was provided that the affairs of the confederacy should be managed by a board of federal commissioners, and that the members of the league should be known henceforth as the United Colonies of New England,[2] a title taken no doubt from that of the United Provinces of the Netherlands.[3]

[1] They were first printed in 1656 in London, in Governor Eaton's code entitled *New Haven's Settling in New England*. For the text of the articles, see Appendix I.

[2] As to the history and structure of that federation, see "Acts of the Federal Commissioners," which form the ninth and tenth volumes of the *Plymouth Records;* Doyle, *English Colonies in America, Puritan*, etc., i, 220–265; *Nar. and Crit. History*, iii, 315, 334, 338, 354, 373; *Memorial Hist. of Boston*, i, 299.

[3] Plymouth "joined in the New England Confederation of 1643, and though the idea sprang from another quarter, it is probable that the form was influenced by suggestions from the Plymouth men, derived

Albany convention of 1684.

Albany meeting of 1694.

Penn's plan of 1697.

Plan of 1721.

Clinton's proposals of 1744 and 1752.

Common danger from the Indians gave the next impulse to collective action that resulted in a convention at Albany in 1684, in which representatives of Massachusetts, New York, Maryland, and Virginia concerted measures of defense against the Five Nations that extended from North Carolina to the northern boundaries of New England;[1] and in 1694 there was another meeting at Albany in which commissioners from Massachusetts, Connecticut, New York, and New Jersey met to frame a treaty with the Five Nations, from whose lands rivers flowed as warpaths in every direction.[2] The practical efforts thus made to consolidate power for common defense were soon followed by various theoretical plans for more perfect unions. In 1696 the newly created board of trade, of which John Locke was a member, suggested the appointment of a captain-general of all the forces on the continent, with such powers as could be exercised by a constitutional king; and in 1697 William Penn appeared before the board and advised an annual "congress" of two delegates from each one of the American provinces, to determine by a plurality vote the ways and means for supporting their union, providing for their safety, and regulating their commerce.[3] When in 1711 a temporary emergency revived the subject, the governors of New England assembled at New London to determine the quotas of their respective colonies for a proposed expedition against Canada, and later in the year New York was invited to another conference, but it came to naught. In 1721, in order to secure the necessary coöperation of the colonies in the pending struggle between England and France for the possession of North America, a plan was devised for placing a captain-general over the colonies, and for a general council to which each provincial assembly should send two of its members.[4] The former in conjunction with the latter was to alter the quotas of men and money which the several assemblies were to raise by their own authorities. In June, 1744, George Clinton, of New York, submitted

from their experience in the United Netherlands." *Nar. and Crit. Hist.*, iii, 281.

[1] See Frothingham, *Rise of the Republic*, 86.

[2] *Mass. Hist. Collections*, xxxi, 102, containing journal of Benjamin Wadsworth, who accompanied the Mass. delegates.

[3] For the text of Penn's plan, see Appendix II.

[4] Cf. "A Representation of the Lords of Trade to the King," in *N. Y. Col. Doc.*, v, 591.

to a convocation of deputies from Massachusetts a plan of union something like the early New England Confederacy, and to that the Six Nations sent their sachems. In 1751 Clinton invited representatives of all the colonies from New Hampshire to South Carolina to meet the Six Nations for composing a league; [1] and in 1752 Governor Dinwiddie advocated distinct northern and southern confederations.[2]

Albany meeting of 1754.

Such was the nature of the loose confederacies — each resting on the ancient quota idea or requisition plan — that preceded the notable meeting held at Albany, June 19, 1754, under an order from the home government bidding the colonies to defend their frontiers, as the French and Indian War was about to begin. Twenty-five delegates from the seven northern colonies met at Albany, and among them was Benjamin Franklin, who is said to have there submitted a plan for organizing a system of colonial defense which was adopted and reported; it provided for a president-general of all the colonies, to be appointed by the Crown, and a grand council to be chosen by the representatives of the people of the several colonies. The real purpose of the meeting is revealed by Madison, who says that "as early as the year 1754, indications having been given of a design in the British Government to levy contributions on the colonies without their consent, a meeting of colonial deputies took place at Albany, which attempted to introduce a compromising substitute, that might at once satisfy the British requisitions, and save their own rights from violation. The attempt had no other effect than, by bringing these rights into a more conspicuous view, to invigorate the attachment to them, on the one side; and to nourish the haughty and encroaching spirit on the other." [3] Franklin himself has told us that "by this plan the general government was to be administered by a president-general, appointed and supported by the Crown, and a grand council, to be chosen by the representatives of the people of the several colonies, met in their respective assemblies, . . . but another scheme was formed, supposed to answer the same purpose better, whereby the

Madison's statement of its purpose.

Franklin's statement.

[1] The journal of the commissioners is in the *Mass. Archives*, xxxviii, 160.

[2] See Bancroft's summary of such movements in the opening chapter of vol. viii of his final revision; *Nar. and Crit. Hist.*, v, 611 *sq.*

[3] *Madison Papers*, ii, 686–687.

governors of the provinces, with some members of their respective councils, were to meet and order the raising of troops, building of forts, etc., *and to draw on the Treasury of Great Britain for the expense, which was afterwards to be refunded by an Act of Parliament laying a tax on America.* . . . Therefore the commissioners came to another previous resolution, viz.: that it was necessary the union should be established by Act of Parliament." [1] In the light of the foregoing it will be easy to understand the part actually played by Franklin as it has been well described by McMaster: "The idea of union had long been in his mind, and to the conference which gathered at Albany he brought a carefully drawn plan. The credit of that plan is commonly given him. But it ought in justice never to be mentioned without a reference to the name of Daniel Coxe. . . .

Plan of Daniel Coxe.

So early as 1722 Coxe foresaw the French aggression, called on the colonies to unite to prevent it, and drew up the heads of a scheme for united action. Coxe proposed a governor-general appointed by the Crown and a congress of delegates chosen by the assemblies of the colonies. Franklin proposed the very same thing. Coxe would have each colony send two delegates annually elected. Franklin would have from two to seven delegates triannually elected. By each the grand council, with consent of the governor-general, was to *determine the* QUOTAS *of men, money, and provisions the colonies should contribute to the common defense.* The difference between them is a difference in detail, not in plan. The detail belongs to Franklin. The plan must be ascribed to Coxe." [2]

It thus appears (1) that Franklin was not the real author of the plan of union of 1754, if plan it may be called; (2) that the scheme of taxation contemplated in that plan was simply the ancient requisition system based on *quotas*, afterwards embodied by Franklin in the Articles of Confederation. McMaster so declares in express terms when he says: "By each the grand council, with the consent of the governor-general, was to determine the quotas of men, money, and provisions the colonies should contribute to the common defense" — precisely the requisition system of the Confederation.

[1] Cf. *The Life and Writings of Benjamin Franklin* (Smyth), iii, 197, 229, 242, 243, 365; vi, 356, 416.

[2] McMaster, *Benjamin Franklin*, 162–163. See Appendix III.

Nothing new was proposed at Albany by Franklin or Coxe; and nothing came of what was proposed except a more determined purpose upon the part of the people to reject what they considered an unjustifiable assault by the British Crown upon colonial rights. To repeat the words of Madison: "The attempt had no other effect than, by bringing these rights into a more conspicuous view, to invigorate the attachment to them on the one side; and to nourish the haughty and encroaching spirit on the other." As the scheme proposed at Albany gave so much power to the Crown, it was rejected by the people in every colony.

Nothing new proposed.

In estimating the effects of the growth of population on federation, it must be remembered that during the century and a half that intervened between the founding of the first settlements and the close of the French and Indian War the population of the thirteen colonies had swelled to full a million and a half [1]— nearly one fourth of that of the mother country. That rapid increase forced upon the early settlements the necessity of continually widening their boundaries. In that way disputes arose not only among the colonists themselves, but with settlers of other nationalities grouped about them whose boundaries were defined in grants from their own sovereigns. The French, who early in the seventeenth century had possessed themselves of Canada and the St. Lawrence, possessed themselves early in the eighteenth of the Mississippi, founding in 1718 the city of New Orleans. Between the mouths of the two mighty rivers were placed at points of the greatest strategic value a line of forts, which were designed to protect from English intrusion that vast domain called New France, which stretched on the west of the Alleghanies from New Orleans to Quebec. By such means as these the French hoped to retain for themselves the valleys of the Mississippi and Ohio, and to confine the English colonies within that comparatively narrow strip of country lying between the Appalachian range and the Atlantic Ocean. But when the time for expansion came, when the necessities of the swelling English population impelled them to pass the tops of the Alleghanies in order to possess themselves of the great valleys beyond, upon which France had first laid hold, the fact

Effects of the growth of population on federation.

New France.

The struggle for expansion.

[1] "1,200,000 whites and a quarter of a million of negroes." Green, *Hist. of the Eng. People*, iv, 167.

was revealed that the young giant of the Atlantic had only been bound by the thongs of Lilliput.[1] When the English colonial system came in collision with the French colonial system, when the new self-governing soldiery which had been reared in the southern countries and in the New England townships went out together under the lead of the mother country to do battle with a colonial power that had never been trained in self-reliance, it "was like a Titan overthrowing a cripple."[2] France's dream of empire in the west was broken, she was forced to give up her priceless possessions and to retire from North America. The results of the French and Indian War were momentous in their effects upon the cause of union. By the overthrow of the one enemy that they feared, the only real cause for the dependence of the colonies upon the mother country was removed at a blow; by their joint endeavors was won the vast domain beyond the Alleghanies that was destined to become a national possession; in the thick of the fight the new nationality, heretofore unconscious of its real character, finally awoke to a sense of its oneness. The struggle for expansion thus became the training-school in which the colonists were for the first time made to realize their capacity for concert of action upon which they had mainly to rely in the greater fight that was soon to come. Within two years after the making of the Peace of Paris, by which the French and Indian War was formally terminated, the colonies were called upon to act in concert in resisting the Stamp Act, which in February, 1765, had passed the Imperial Parliament "with less opposition than a turnpike bill."[3]

Effects of French and Indian War upon the cause of union.

When Massachusetts spoke the word for the first American Congress, the nine of the thirteen colonies that met in New York in response to the summons took the first step on the way to union. The Massachusetts House of Representatives, in a circular letter of June 8, proposed to the other colonies the appointment of committees to meet at New York, in October,

Stamp Act Congress, Oct. 7, 1765.

[1] See *Nar. and Crit. Hist.*, v, ch. viii, entitled "The Struggle for the great valleys of North America."

[2] Fiske, *Am. Political Ideas*, 56. But see the criticism of that statement in *Nar. and Crit. Hist.*, v, 533, note 1.

[3] Green, *Hist. of the Eng. People*, iv, 230. For the history of the Peace of Paris, February, 1763, see Parkman, *Montcalm and Wolfe*, ii, 383 *sq.*

"to consult together on the present circumstances of the colonies, and the difficulties to which they are and must be reduced by the operation of the Acts of Parliament, for levying duties and taxes on the colonies; and to consider of a general and united, dutiful, loyal and humble representation of their condition to His Majesty and to the Parliament and to implore relief." Delegates, variously appointed from Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, and South Carolina met in October, with Timothy Ruggles of Massachusetts as chairman, and on the 19th a "declaration of the rights and grievances of the colonists in America,"[1] originally drafted by John Dickinson, a delegate from Pennsylvania, was agreed to. On the 22d a petition to the King drawn by the same hand, and a memorial and petition to the House of Lords, were approved, followed on the 23d by a petition to the Commons. The petition to the Commons was presented in that body, January 27, 1766, and, after some debate, was passed over without action.

On March 18, 1766, the Stamp Act was repealed by the Whig Ministry of Rockingham which succeeded that of Grenville in July, 1765, it being specially declared at the time, in a declaratory act,[2] that the Parliament of Great Britain "had both, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, in all cases whatsoever."

First Continental Congress, Sept., 1774.

Nine years later, when Massachusetts, at the suggestion of Virginia, again gave the word, the First Continental Congress assembled in Philadelphia in September, 1774, in which all the colonies were represented except Georgia. In this the first American assembly which was really national, and in which Washington sat in his colonel's uniform, the new-born spirit of union was embodied in a resolution that made the cause of the people of Massachusetts the cause of all by the declaration that if force shall be used "all America ought to support them in their opposition." In the preceding March, Lord North's Government, after communicating to the House the dispatches from America, had carried drastic measures, by one of which the port of Boston was closed, and its trade transferred, after

Drastic English legislation.

[1] See Appendix IV.

[2] See Appendix V.

June 1, to the older port of Salem. By a second, the charter of the colony was suspended. By a third, provision was made for the quartering of troops within the province; while by a fourth was legalized the transfer to England of trials growing out of attempts to quell riots in the colony. After the text of the new statute was known in Boston on June 2, the governor, Thomas Hutchinson, who was born and bred in the colony, went to England to explain to the Ministers that "the prevalence of a spirit of opposition to the Government in the plantation is the natural consequence of the great growth of the colonies so remote from the parent state, and not the effect of oppression in the King or his servants, as the promoters of this spirit would have the world believe." [1] In May, a month before the text of the obnoxious acts reached Boston, the burgesses of Virginia ordered that June 1, the day upon which the Boston Port Bill was to take effect, be set apart as a day of fasting and prayer; and, after Dunmore had promptly dissolved them, as a counterblast they assembled again in the Raleigh Tavern and issued a call to the other colonies for a general congress. Rhode Island, New York, and Massachusetts had also asked for a general "Congress of Committees," — the assembly of the latter locking its doors against the governor's messenger, sent to dissolve it, until it had completed its choice of a committee "to meet the committees appointed by the several colonies to consult together upon the present state of the colonies."

Action of Virginia burgesses.

Those who came together at Philadelphia on September 5, as a part of an almost spontaneous movement, were the most eminent men among the colonists, with an ability and intelligence that was remarkable. The most notable group, that from Virginia, is arranged in the following order: Peyton Randolph (chosen president), Richard Henry Lee, George Washington, Patrick Henry, Richard Bland, Benjamin Harrison, and Edmund Pendleton.[2] From South Carolina came two members of the Stamp Act Congress of 1765, John Rutledge and Christopher Gadsden; from Massachusetts, Thomas Cushing, Samuel Adams, and John Adams; from New York, John

Leaders of the Congress.

[1] The same idea was expressed by Turgot, who said that "colonies are like fruit, which cling to the tree only till they ripen. As soon as America can take care of itself, it will do what Carthage did." *Œuvres de M. Turgot* (Paris, 1808–11), ii, 19, 66.

[2] *Journals of the Continental Congress*, 1774, i, 44 (Ford ed.).

Jay, James Duane, and Philip Livingston; from Pennsylvania, Joseph Galloway, Thomas Mifflin, and Edward Biddle; from New Hampshire, John Sullivan; from Connecticut, Roger Sherman and Silas Deane; from Rhode Island, Stephen Hopkins; from Maryland, Samuel Chase and Robert Goldsborough; from New Jersey, William Livingston and James Kinsey; from North Carolina, William Hooper and Joseph Hewes, and Richard Caswell. While Galloway, the speaker and leader of the Pennsylvania assembly, wished the state house to be used, "the members met at the City (or Smith's) Tavern, at ten o'clock, and walked to the Carpenters' Hall, where they took a view of the room, and of the chamber where is an excellent library. . . . The general cry was that this was a good room, and the question was put, whether we were satisfied with this room? and it passed in the affirmative." [1]

Declaration by Boston and other towns, Sept. 9.

Four days after the meeting of the Congress at Philadelphia, delegates from Boston and the other towns in Suffolk County had declared in convention that the acts complained of, being unconstitutional, ought not to be obeyed; that the new judges appointed under the act of suspension ought not to be permitted to act; that the collectors of taxes should be advised to retain the money collected, rather than put it into General Gage's treasury; and that in view of the impending conflict, the people ought to be urged to prepare for war, — not with a view to provoking hostilities, but in order, if necessary, to resist aggression. They resolved to accept the action at Philadelphia as law for the common guidance of the colonies; and they declared also for a provincial congress to take the place of the legislative council of their suspended charter.

No talk of revolution at outset.

At the outset of the seven weeks' meeting of the Congress, which disclosed a nice balance of parties, there was no talk of actual revolution in the air. The "brace of Adamses," who were said to be for independence, and who were suspected of a purpose to assume the leadership, failed to assert themselves in that way. Under such conditions the assembly came near accepting the guidance of the conservative Galloway, a genuine loyalist, and yet a patriot and advocate of the legal rights of the colonies, who proposed a memorial to the Crown suggesting a confederation of the colonies, with a legislature of

Galloway's plan of confederation.

[1] John Adams's *Works*, ii, 365.

their own,[1] after the plan drafted by Coxe and Franklin, in the meeting at Albany in 1754. That proposal failed by a very narrow majority when put to the vote. Even Rutledge, described by Patrick Henry as the most eloquent man in the assembly, declared it to be an "almost perfect plan." From that idle dream the Congress turned to closer organization of the colonies for concert of action; and to the drafting of a series of state papers defining the principles upon which such action was to be based. In those papers was embodied a hearty response to the appeal of Massachusetts. It was the common sentiment of all that the whole continent should support her resistance to the unconstitutional changes in her government, and that any one who should accept office under the new order of things ought to be considered a public enemy. On October 14, the Congress agreed to a Declaration of Rights and Liberties, asserting "that the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts, have the following Rights." The first draft was made by John Sullivan, and among the Adams papers is a paper in a script "somewhat resembling that of Major Sullivan," which is believed to be the report first submitted.[2] The fourth article, which was prepared by John Adams, caused much debate both in committee and in Congress, because Galloway and his followers thought it aimed at independence. An effort to amend it failed; it was left unaltered in its essentials; and in its final form is the work of Adams.[3] On the 20th was read and signed by fifty-three members "The Association," [4] in which it was declared: "To obtain redress of these grievances, which threaten destruction to the lives, liberty, and property of His Majesty's subjects in North America, we are of opinion that a non-importation, non-consumption, and non-exportation agreement, faithfully adhered to, will prove the most speedy, effectual, and peaceable measure." On the 21st,

Declaration of Rights and Liberties, Oct. 14.

"The Association," Oct. 20.

[1] For Galloway's plan, see *Journals of the Continental Congress*, 1774, i, 43–48 (Ford ed.). See Galloway, *Historical and Political Reflections on the Rise and Progress of the American Rebellion* (1780), 70.

[2] It is printed in Adams's *Works*, ii, 535.

[3] See his letter to Edward Biddle, December 12, 1774; *Journals of Continental Congress*, 1774, i, 63, and notes (Ford ed.).

[4] Ibid. 75 *sq.*

after the approval of the address to the people of Great Britain drafted by John Jay, was resumed the consideration of the memorial to the inhabitants of the British colonies, drafted by Richard Henry Lee, and the same being gone through and debated by paragraphs and amended, was approved. On the 22d was read the address to be presented to the colonies in Canada; and on the 26th was signed the petition to the King, concluding with an expression of the hope "that Your Majesty may enjoy every felicity through a long and glorious reign over loyal and happy subjects, and that your descendants may inherit your prosperity and dominions 'till time shall be no more." After thus entreating their sovereign, in terms of affectionate and respectful eloquence, to restore to them their violated rights, their rights as English freemen, the delegates provided for another Congress to meet in the following May, in the event that their grievances should not in the mean time be redressed. When the proceedings of the Congress were published in England, Lord Chatham declared that "for solidity of reason, for sagacity and wisdom of conclusion, under a complication of difficult circumstances, no nation or body of men can stand in preference to the general congress at Philadelphia. The histories of Greece and Rome give us nothing equal to it, and all attempts to impose servitude upon such a mighty continental nation must be in vain."

Address to people of Great Britain, Oct. 21.

Petition to King, Oct. 26.

Another Congress in following May

In the Second Continental Congress, which met at Philadelphia in the chamber of the state house since known as Independence Hall, May 10, 1775, all the colonies appeared; and, in the summer of 1776, all took part in the two great acts[1] that gave life and character to the new nationality. From the meeting of that Congress down to March 1, 1781, when Maryland signed the Articles of Confederation and completed the first Constitution, it was the only cohesive force that held the states together and directed their federal affairs. During that interval of nearly six years the Congress was the Federal Government — such a government as it was — *de jure and de facto;* and the general scope of its powers cannot be more clearly

Second Continental Congress, May, 1775.

[1] On the 7th of June Richard Henry Lee moved a resolution, which was adopted by Congress on the 11th, "That these United Colonies are, and of right ought to be, free and independent states. . . . And that a plan of confederation be prepared and transmitted to the respective colonies for their consideration and approbation."

expressed than in the language of Justice Chase, who said that "the powers of Congress originated from necessity and arose out of and were only limited by events, or, in other words, they were revolutionary in their very nature. Their extent depended on the exigencies and necessities of public affairs." [1]

Articles of Confederation drafted by Franklin, July, 1775.

After a long and painful travail the Second Continental Congress gave birth to the first Federal Constitution of the United States. "It appears that as early as the twenty-first of July, 1775, a plan, entitled 'Articles of Confederation and *perpetual* Union of the Colonies,' had been sketched by Dr. Franklin, the plan being on that day submitted by him to Congress; and though not copied into their Journals, remaining on their files in his handwriting. But notwithstanding the term 'perpetual' observed in the title, the Articles provided expressly for the event of a return of the colonies to a connection with Great Britain." [2] This sketch became the basis for the plan reported by the committee on the 12th of July, now also remaining on the files of Congress in the handwriting of Mr. Dickinson. The plan, though dated after the Declaration of Independence, was probably drawn up before that event; since the name of colonies, not states, is used throughout the draft. The plan reported was debated and amended from time to time, till the 17th of November, 1777, when it was agreed to by Congress, and proposed to the legislatures of the states, with an explanatory and recommendatory letter. The ratifications of these, by their delegates in Congress, duly authorized, took place at successive dates; but were not completed till the first of March, 1781, when Maryland, who had made it a prerequisite that the vacant lands acquired from the British Crown should be a common fund, yielded to the persuasion that a final and formal establishment of the "Federal Union and Government would make a favorable impression, not only on other foreign nations, but on Great Britain herself." [3]

Second draft by Dickinson, July, 1776.

Debate begun July 22;

On July 22 the House resolved itself into a committee of the whole to take into consideration the articles of a confederation reported by the committee on July 12; and on the 30th

[1] See Ware *v.* Hylton, 3 Dallas, 232. Von Holst incorrectly attributes that statement to Jay, C. J.

[2] See Franklin, *Works* (Sparks ed.), v, 91; *Secret Journals of Congress* (Domestic Affairs), 21st July, 1775, i, 283.

[3] *Madison Papers*, ii, 688–689.

and 31st of that month, and the first of the ensuing, those articles were debated which determined the proportion or quota of money each state should furnish to the common treasury, and the manner of voting in Congress. Jefferson has preserved for us only a fragment of the debates that took place in 1776 on the Declaration of Independence and on two of the Articles of Confederation (Articles XI and XVII) named above. "These Debates were given to Mr. Madison, in Mr. Jefferson's own handwriting as now on file among Mr. Madison's papers. They are prefixed as forming a part of the only materials known to exist in the form of Debates within the Revolutionary Congress."[1] From this precious fragment thus preserved a few extracts will be taken. The original draft of Article XI provided that "all charges of war and all other expenses that shall be incurred for the common defense, or general welfare, and allowed by the United States assembled, shall be defrayed out of a common treasury, which shall be supplied by the several colonies in proportion to the number of inhabitants of every age, sex, and quality, except Indians not paying taxes, in each colony, a true account of which, distinguishing the white inhabitants, shall be triennially taken and transmitted to the Assembly of the United States." After Mr. Chase of Maryland had moved that the quotas should be paid, not by the number of inhabitants of every condition, but by that of the "white inhabitants," he said "he considered the number of inhabitants as a tolerably good criterion of property, and that this might always be obtained. He therefore thought it the best mode we could adopt, with one exception only. He observed that negroes are property, and as such cannot be distinguished from the lands or personalties held in those states where there are a few slaves." Mr. John Adams then replied "that the numbers of people were taken by this article as an index of the wealth of a state, and not as subjects of taxation. That as to this matter it was of no consequence by what name you called your people, whether by that of freemen or slaves. That in some countries the laboring poor were called freemen, in others they were called slaves: but that the difference as to the state was imaginary only. . . . That the condition of the laboring poor in most countries — that of the fishermen,

fragment preserved by Jefferson.

Original draft of Article XI.

Comments by Chase;

by John Adams;

[1] *Madison Papers*, ii, 9–39.

particularly of the Northern States — is as abject as that of slaves." Mr. Wilson said, "that if this amendment should take place, the Southern colonies would have all the benefit of slaves, whilst the Northern ones would bear the burden. That slaves increase the profits of a state, which the Southern States mean to take to themselves; that they also increase the burden of defense, which would of course fall so much the heavier on the Northern; that slaves occupy the places of freemen and eat their food. Dismiss your slaves, and freemen will take their places. It is our duty to lay every discouragement on the importation of slaves; but this amendment would give the *jus trium liberorum* to him who would import slaves." Doctor Witherspoon said "that the value of lands and houses was the best estimate of the wealth of a nation, and that it was practicable to obtain such a valuation. . . . It has been objected that negroes eat the food of freemen, and therefore should be taxed; horses also eat the food of freemen, therefore they should be taxed."

by Wilson;

by Witherspoon.

After the amendment had been defeated by a vote of seven Northern against five Southern States, with Georgia divided, the debate was shifted, with forty-one members present, to Article XVII, which provided that "in determining questions, each colony shall have one vote." Then it was that "Mr. Chase observed, that this article was the most likely to divide us, of any one proposed in the draught then under consideration. That the larger colonies had threatened they would not confederate at all, if their weight in Congress should not be equal to the numbers of people they added to the confederacy; while the smaller ones declared against a union, if they did not retain an equal vote for the protection of their rights. That it was of the utmost consequence to bring the parties together, as, should we sever from each other, either no foreign power will ally with us at all, or the different states will form different alliances, and thus increase the horrors of those scenes of civil war and bloodshed, which, in such a state of separation and independence, would render us a miserable people. . . . He therefore proposed, that in votes relating to money the voice of each colony should be proportioned to the number of its inhabitants." Dr. Franklin "thought, that the votes should be so proportioned in all cases. He took notice that the Dela-

Article XVII.

Comments by Chase;

by Franklin;

ware counties had bound up their delegates to disagree to this article. He thought it a very extraordinary language to be held by any state, that they would not confederate with us unless we would let them dispose of our money. Certainly, if we vote equally we ought to pay equally: but the smaller states will hardly purchase the privilege at this price. . . . He reprobated the original agreement of Congress to vote by colonies, and therefore was for their voting in all cases according to the number of taxables." Doctor Witherspoon "opposed every alteration of the article. All men admit that a confederacy is necessary. Should the idea get abroad that there is likely to be no union among us, it will damp the minds of the people, diminish the glory of the struggle, and lessen its importance; because it will open to our view future prospects of war and dissension among ourselves. If an equal vote be refused, the smaller states will become vassals to the larger; and all experience has shown that the vassals and subjects of free states are the most enslaved." He added "that the Belgic Confederacy voted by provinces." Doctor Rush "took notice, that the decay of the liberties of the Dutch Republic proceeded from three causes: 1st. The perfect unanimity requisite on all occasions. 2d. Their obligation to consult their constituents. 3d. Their voting by provinces. This last destroyed the equality of representation; and the liberties of Great Britain also are sinking from the same defect." Mr. Hopkins observed "that history affords no instance of such a thing as equal representation. The Germanic body votes by states. The Helvetic body does the same; and so does the Belgic Confederacy. *That too little is known of the ancient confederations to say what was their practice.*" Such are the seed-points of light that glisten through the precious fragment that preserves for us "the only materials known to exist in the form of Debates within the Revolutionary Congress." As first words upon mighty questions they possess an interest and a value all their own.

by Witherspoon;

by Rush;

by Hopkins.

Few things in our constitutional history are more momentous than the determined refusal of Maryland to ratify the Articles until her just demands as to the western territory should first be complied with. At the outset she was supported by New Jersey and Delaware, and their joint refusal to enter into the confederacy grew out of the controversy as to the ulti-

Maryland's influence upon the land cessions to United States.

mate ownership of the great western territory of which France had been dispossessed. After the Revolution had extinguished the rights of the English Crown in that vast domain, Virginia, New York, Connecticut, and Massachusetts undertook to claim it for themselves under conflicting and irreconcilable titles. The three resisting states, whose western boundaries were irrevocably fixed, could never hope to share in this great heritage unless its ownership should be vested in the corporate person of the new nationality. To prevent such a contingency the claiming states had procured an amendment of the Articles to the effect that no state should be deprived of territory for the benefit of the United States.[1] Delaware and New Jersey soon withdrew from the controversy, leaving the fight for national dominion over this priceless possession to Maryland alone. In her "Instructions" to her delegates read in Congress, May 21, 1779, her position was clearly and distinctly defined. She claimed "that a country unsettled at the commencement of this war, claimed by the British Crown, and ceded to it by the Treaty of Paris, if wrested from that common enemy by the blood and treasure of the thirteen states, should be considered as common property, subject to be parceled out by Congress into free, convenient, and independent governments, in such manner and at such times as the wisdom of that assembly shall hereafter direct." [2] Fortunately for the future of the country, from this high ground she never withdrew. In January, 1781, Virginia agreed conditionally to yield her claims;[3] on March 1, 1781, New York executed a transfer of her rights to the United States; and on that day Maryland completed the new Constitution by giving it her adhesion.[4] Exactly three years thereafter Virginia conveyed without conditions, and in due time Massachusetts and Connecticut did substantially the same thing. In that way the new nationality became the sovereign possessor of "the whole northwestern territory — the area of the great states of Michigan, Wisconsin, Illinois, Indiana, and Ohio (excepting the Connecticut Reserve," [5] which, under the Articles of Confederation, it had no express right either to hold

"Instructions" to her delegates.

Virginia, New York, Massachusetts, and Connecticut yield.

[1] See *Journals of Congress*, ii, 304.
[2] Ibid. iii, 281.
[3] *Journal of Va. House of Delegates*, 79.
[4] *Journals of Congress*, iii, 581, 582, 591.
[5] *The Critical Period*, 194.

or govern.)[1] Not until Maryland had been assured that this great prize should belong to the new confederacy, not until its right to possess this vast domain as folkland had been clearly admitted, did she agree to become a member of the league whose Constitution soon proved itself to be more weak, more worthless, more impotent than that of any of the older Teutonic leagues after which it was patterned.

Northwest territory vested in new nationality.

In 1754 we find Dr. Franklin at Albany proposing a plan of federation, heretofore explained, of which Daniel Coxe was probably the chief designer. Twenty-one years later we find him at Philadelphia making the first draft of the Articles of Confederation, which survives in his handwriting. As that performance simply embodied the then prevailing type of confederation resting on the requisition system, the documentary evidence is conclusive that, down to that time, the most original and resourceful mind of the epoch had conceived of nothing new in the way of a federal government. And, so far as Congress and the state legislatures were concerned, certainly no attempt at change or reform was made down to the completion of the first Constitution by the acceptance of the Articles by Maryland, March 1, 1781. That, down to that date, American statesmen had exhibited no fertility of resource whatever in the making of federal constitutions is manifest from the text of their first performance reproduced as Appendix X.

Sterility of designers of first Constitution.

The one particular in which our first Federal Constitution rose above the older Teutonic leagues after which it was patterned was embodied in the new principle of interstate citizenship, which it originated. "The principle of inter-citizenship infused itself neither into the constitution of the old German Empire, nor of Switzerland, nor of Holland." [2] Section one of Article four of the Articles of Confederation provided that "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens of the several states." The

The principle of inter-citizenship.

[1] As to "the exercise of national sovereignty in the sense of eminent domain, a power totally foreign to the Articles of Confederation" under the Ordinances of 1784 and 1787, see Dr. Adams's paper entitled "Maryland's Influence upon Land Cessions of the United States." *J. H. Studies*, 3d series.

[2] Bancroft, *Hist. of Const.*, i, 118.

substance of that provision was reproduced in Section two of Article four of the existing Constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." With that exception the first Constitution simply created, on the old plan, "a firm league of friendship," in which no taxing power whatever was vested. "All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of the land within each state. . . . The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states, within the time agreed upon by the United States in Congress assembled."

First Constitution devoid of taxing power.

Congress was authorized "to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state, which requisition shall be binding; and thereupon the legislature of each state shall appoint the regimental officers; raise the men, clothe, arm and equip them." Thus the entire control of the purse and the sword was retained by the state legislatures. There was no national executive or judiciary. Such federal powers as the Confederation did possess were vested and confused in a one-chamber assembly composed of delegates which the state legislatures could appoint and recall at pleasure. In that assembly each state had an equal vote; important measures required the votes of nine of the thirteen states and amendments the votes of all. Congress could borrow money, but it could make no provision for its repayment outside of the requisition system that depended alone on the power of the states; it alone could declare war, but it had no power to compel the enlistment, arming, or support of an army; it alone could decide disputes between the states, but it had no power to compel either disputant to respect or obey its decisions; it alone could make treaties with foreign nations, but it had no power to prevent individual states from violating them. Congress had no power to prevent or punish offenses against its own laws, or even effectively to perform the duties

Purse and sword retained by the states.

Congress possesssed hardly more than advisory power.

imposed upon it by the constitution of the league; it had hardly more than advisory powers at best. Even commerce, foreign and domestic, was to be regulated entirely by the states; and it was not long before state self-interest began to show itself in the regulation of duties on imports. The states were, however, forbidden to make treaties, peace, or war, to grant titles of nobility, to keep vessels of war or soldiers, or to buy imports that would conflict with treaties already proposed to France or Spain. The fatal defect in such a constitution was of course a lack of taxing power, a lack the quota system utterly failed to supply.

In reviewing the history of the results of that system Hamilton said: "The universal delinquency of the states during the war shall be passed over with the bare mention of it. The public embarrassments were a plausible apology for that delinquency; and it was hoped the peace would have produced greater punctuality. The experiment has disappointed that hope to a degree which confounds the least sanguine. A comparative view of the compliances of the several states for the five last years will furnish a striking result. During that period, as appears by a statement on our files, New Hampshire, North Carolina, South Carolina, and Georgia have paid nothing. I say 'nothing' because the only actual payment is the trifling sum of about seven thousand dollars by New Hampshire. South Carolina indeed has credits, but these are merely by way of discount on the supplies furnished by her during the war, in consideration of her peculiar sufferings and exertions while the immediate theatre of it. Connecticut and Delaware have paid about one third of their requisitions; Massachusetts, Rhode Island, and Maryland, about one half; Virginia about three fifths; Pennsylvania nearly the whole; and New York more than her quota. . . . Things are continually growing worse; the last year in particular produced less than $200,000, and that from only two or three states. Several of the states have been so long unaccustomed to pay, that they seem no longer concerned even about the appearance of compliance. Connecticut and New Jersey have almost formally declined paying any longer. The ostensible motive is the non-concurrence of the state in the import system. The real one must be conjectured from the fact. Pennsylvania, if I understand the

Hamilton's graphic picture.

scope of some late resolutions, means to discount the interest she pays upon her assumption to her own citizens; in which case there will be little coming from her to the United States. This seems to be bringing matters to a crisis. The pecuniary support of the Federal Government has of late devolved almost entirely upon Pennsylvania and New York. If Pennsylvania refused to continue her aid, what will be the situation of New York: Are we willing to be the Atlas of the Union? or are we willing to see it perish?" [1]

[1] Speech delivered in New York legislature on the revenue system in 1787. See Hamilton's *Works* (Lodge ed.), ii, 192 *sq.*

## CHAPTER VI

### PELATIAH WEBSTER'S INVENTION OF FEBRUARY 16, 1783

First Federal Constitution failed from a lack of taxing power.

By Hamilton's masterful summary the fact is fixed with the precision of a mathematical demonstration that our first Federal Constitution failed because it did not possess either the power to impose or to collect federal taxes as such. The entire taxing power was vested in thirteen state legislatures, each of which could fail in its duty under the quota system, without the fear of being coerced or punished by the federal head. From the review heretofore made of preëxisting federal governments, during the two thousand years and more that intervene between the founding of the Achaian League (B.C. 281), and the completion of the Articles of Confederation (March 1, 1781), it appears that during that vast expanse of time no federal government had ever existed armed with the power to tax. In every one of them the entire taxing power was vested in the states or cities composing the league; in every one of them contributions were made through the requisition or quota system. No claim can be set up that any American statesman connected with the administration of government ever proposed prior to February 16, 1783, any departure from the one stereotyped plan of federal government the world had ever known. When Coxe and Franklin made their experiment in 1754 they simply reproduced the ancient quota system; when in 1775 Franklin was given a free hand to draft a new federal constitution as a whole he made no material change in his original performance; during the six years in which the Franklin draft was in the process of amendment by Congress, that body made no attempt to depart from the old model. When in January, 1783, the desperate struggle for federal revenue that followed the close of hostilities reached its climax, the one thought of those who directed the deliberations of Congress was to amend the old system by some financial expedient that depended entirely upon the unanimous consent of thirteen states bitterly opposed to any relinquishment of the taxing power. In sum-

No real reform ever proposed prior to 1783.

Mr. Bland's summing up, Jan. 27, 1783.

ming up the situation on January 27, Mr. Bland of Virginia said: "That the ideas of the states on the subject were so averse to a general revenue in the hands of Congress, that if such a revenue were proper it was unattainable; that as the deficiency of the contributions from the states proceeded, not from their complaints of their inability, but of the inequality of the apportionments, it would be a wiser course to pursue the rule of the Confederation, to wit, to ground the requisition on an actual valuation of lands; that Congress would then stand on firm ground, and a practicable mode." [1] At an earlier moment on that very day, Mr. Bland had notified Congress of the act of his state repealing the grant of the impost and of her inability to pay her quota beyond a certain amount.[2] Just an hundred and forty years had elapsed since the English colonists in America embodied their first attempt to construct a federal system in the constitution of the United Colonies of New England modeled upon that of the United Provinces of the Netherlands of which the Plymouth men had a special knowledge and experience. President John Adams summed up the whole matter when he said in his inaugural address, heretofore quoted, that the United Provinces of the Netherlands and the Confederation of Swiss Cantons were "the only examples which remain with any detail and precision in history, and certainly the only ones which the people at large had ever considered." In 1643 American statesmen began by making a servile copy of those impotent systems, "kept together by the peculiarity of their topographical position"; and down to the beginning of the year 1783 no advance whatever had been made upon them.

140 years of sterility.

Servile copying.

Webster proposed to abolish ancient system as early as 1781.

When the time was thus ripe for a revolution, an original thinker of the highest order, an experienced financier, and the most authoritative expounder of political economy of that epoch, grappled with the pending taxative and financial problem and solved it in the only way in which it could have been solved. Foreseeing what was to come, Pelatiah Webster had

[1] *Madison Papers*, i, 288. The debate on revenue began on January 8, "on the report for valuing the land conformably to the rule laid down in the Federal Articles." That rule proposed to require the states to value the land, and return the valuations to Congress. Ibid. 249–301.

[2] Resolution of 28th Dec., 1782, in *Journal of House of Delegates*, 80, 90.

proposed in 1781 the entire abolition of the ancient conception of a federal government resting on the quota system with which the world had been for so long a time cursed. No one ever comprehended more clearly than he did the utter hopelessness of the attempt to amend a federal system that should be abolished as a whole. That statement can best be supported by his own words:—

His exposure of the weaknesses of the first Constitution.

"Note 1. Forming a plan of confederation or a system of general government of the United States engrossed the attention of Congress from the Declaration of Independence, July 4, 1776, till the same was completed by Congress, July 9, 1778, and recommended to the several States for ratification, which finally took place March 1, 1781, from which time the said confederation was considered as the grand constitution of the general government, and the whole administration was conformed to it.

"And as it had stood the test of discussion in Congress for two years before they completed and adopted it, and in all the States for three years more before it was finally ratified, one would have thought that it must have been a very finished and perfect plan of government.

"But on trial of it in practice it was found to be extremely weak, defective, totally inefficient, and altogether inadequate to its great ends and purposes, for

"1. It blended the legislative and executive powers together in one body.

"2. This body, viz.: Congress, consisted of but one house, without any check upon their resolutions.

"3. The powers of Congress in very few instances were definitive and final; in the most important articles of government they could do no more than recommend to the several States, the consent of every one of which was necessary to give legal sanction to any act so recommended.

"4. They could assess and levy no taxes.

"5. They could institute and execute no punishments except in the military department.

"6. They had no power of deciding or controlling the contentions and disputes of different States with each other.

"7. They could not regulate the general trade; or,

"8. Even make laws to secure either public treaties with

foreign States, or the persons of public ambassadors, or to punish violations or injuries done to either of them.

"9. They could institute no general judiciary powers.

"10. They could regulate no public roads, canals, or inland navigation, etc., etc., etc.

"Absurd doctrine of rotation."

"And what caps all the rest was that (whilst under such an inefficient political constitution the only chance we had of any tolerable administration lay wholly in the prudence and wisdom of the men who happened to take the lead in our public councils) it was fatally provided, by the absurd doctrine of rotation, that if any member of Congress by three years' experience and application had qualified himself to manage our public affairs with consistency and fitness, that he should be constitutionally and absolutely rendered incapable of serving any longer till by three years' discontinuance he had pretty well lost the cue or train of the public counsels and forgot the ideas and plans which made his service useful and important, and, in the meantime, his place should be supplied by a fresh man, who had the whole matter to learn, and when he had learned it was to give place to another fresh man, and so on to the end of the chapter.

"The sensible mind of the United States by long experience of the fatal mischief of anarchy, or (which is about the same thing) of this ridiculous, inefficient form of government, began to apprehend that there was something wrong in our policy which ought to be redressed and mended, but nobody undertook to delineate the necessary amendments.

"I was then pretty much at leisure, and was fully of opinion (though the sentiment of that time would not very well bear) that it would be ten times easier to form a new constitution than to mend the old one.[1] I therefore sat myself down to sketch out the leading principles of that political constitution which I thought necessary to the preservation and happiness of the United States of America, which are comprised in this Dissertation.

"Ten times easier to form a new constitution than to mend the old one."

"*I hope the reader will please consider that these are the*

[1] Nothing is more remarkable than the boldness with which he stated that view while other men clung to the idea of amending the Articles of Confederation. The so-called Virginia plan presented in May, 1787, begins with the declaration "that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution."

*original thoughts of a private individual, dictated by the nature of the subject only, long before the important theme became the great object of discussion in the most dignified and important assembly which ever sat or decided in America.*"

The bold innovator has thus given us in a very striking form the reasons that impelled him to propose in 1781 the calling of a "Continental Convention," for the purpose of wiping out the first Federal Constitution as a whole, and substituting for it a new scheme resting on a wholly novel theory.

Plan of Feb. 16, 1783, published at the very doors of Congress.

On February 16, 1783, when Philadelphia was the storm-centre of the struggle so to amend the first Federal Constitution as to enable it to produce a more certain revenue, Pelatiah Webster published, at the very doors of Congress, his entirely new plan of a federal government which was to solve the problem not only for this country but for all the world. Striking at the very heart of the difficulty, he said that the power to levy federal taxes must be taken away from the thirteen popular assemblies and vested directly in a sovereign federal assembly armed with the independent power to enforce its own mandates, through its own machinery. To use his own words: —

Webster's path-breaking proposal.

"I begin with my first and great principle, viz.: That the Constitution must vest powers in every department sufficient to secure and make effectual the ends of it. The supreme authority must have the power of making war and peace — of appointing armies and navies — of appointing officers both civil and military — of making contracts — of emitting, coining, and borrowing money — of regulating trade — of making treaties with foreign powers — of establishing post-offices — and in short of doing everything which the well-being of the Commonwealth may require, and which is not compatible to any particular State, all of which require money, and cannot possibly be made effectual without it.

"*They must therefore of necessity be vested with power of taxation. I know this is a most important and weighty truth, a dreadful engine of oppression, tyranny, and injury, when ill used; yet, from the necessity of the case it must be admitted.*

"For to give a supreme authority a power of making contracts, without any power of payment — of appointing officers civil and military, without money to pay them — a power to build ships, without any money to do it with — a power of

emitting money, without any power to redeem it — or of borrowing money, without any power to make payment, etc., etc. — such solecisms in government are so nugatory and absurd that I really think to offer further argument on the subject would be to insult the understanding of my readers.

"Supreme authority" must not depend on "thirteen popular assemblies."

"*To make all these payments dependent on the votes of thirteen popular assemblies, who will undertake to judge of the propriety of every contract and every occasion of money, and grant or withhold supplies, according to their opinion, whilst at the same time the operations of the whole may be stopped by the vote of a single one of them, is absurd;* for this renders all supplies so precarious and the public credit so extremely uncertain, as must in its nature render all efforts in war, and all regular administration in peace, utterly impracticable, as well as most pointedly ridiculous. Is there a man to be found who would lend money, or render personal services, or make contracts on such precarious security? Of this we have a proof of fact, the strongest of all proofs, a fatal experience, the surest tho' severest of all demonstration, which renders all other proof or argument on this subject quite unnecessary.

"The present broken state of our finances — public debts and bankruptcies — enormous and ridiculous depreciation of public securities — with the total annihilation of our public credit — prove beyond all contradiction the vanity of all recourse to the particular Assemblies of the States. The recent instance of the duty of five per cent on imported goods, struck dead, and the bankruptcies which ensued on the single vote of Rhode Island, affords another proof of what it is certain may be done again in like circumstances.

Must levy duties on imports.

"*I have another reason why a power of taxation or of raising money, ought to be vested in the supreme authority of our commonwealth*, viz.: the monies necessary for the public ought to be raised by a duty imposed on imported goods, not a bare five per cent or any other per cent on all imported goods indiscriminately, but a duty much heavier on all articles of luxury or mere ornament, and which are consumed principally by the rich or prodigal part of the community, such as silks of all sorts, muslins, cambricks, lawns, superfine cloths, spirits, wines, etc., etc.

"Such an impost would ease the husbandman, the mechanic,

and the poor; would have all the practical effects of a sumptuary law; would mend the economy, and increase the industry of the community; would be collected without the shocking circumstances of collectors and their warrants; and make the quantity of tax paid always depend on the choice of the person who pays it.

"*This tax can be laid by the supreme authority much more conveniently than by the particular Assemblies, and would in no case be subject to their repeals or modifications*, and, of course, the public credit would never be dependent on, or liable to bankruptcy by the humors of any particular Assembly. In an Essay on Finance, which I design soon to offer to the public, this subject will be treated more fully. (See my 'Sixth Essay on Free Trade and Finance,' p. 229.)"

Prejudice in favor of exclusive state taxation deep-rooted.

This scientific writer on finance and trained student of government and law knew perfectly well that no federal system that ever existed had been armed with the power to tax; he knew perfectly well that his proposal was without a precedent in history; and he perfectly understood the deep-rooted prejudice in favor of the exclusive power of the states to tax,[1] as that prejudice had been portrayed in Mr. Bland's statement of January 27. With consummate art he rested his argument in favor of his revolutionary proposal upon the absolute necessity that demanded it. He condensed it all into a narrow compass when he admitted that the "power of taxation" is "a dreadful engine of oppression, tyranny, and injury, when ill used; yet from the necessity of the case it must be admitted. . . . On the whole, I take it that the very existence and use of our Union essentially depends on the full energy and final effect of the laws made to support it, and therefore I sacrifice all other considerations to this energy and effect, and if our Union is not worth this purchase, we must give it up — the nature of the thing does not admit of any other alternative. I do contend

Webster's defense of his new theory of federal taxation.

[1] On that point Madison said: "It required but little time, after taking my seat in the House of Delegates in May, 1784, to discover, that however favorable the general disposition of the State might be towards the Confederacy, the Legislature retained the aversion of its predecessors to transfers of power from the State to the Government of the Union; notwithstanding the urgent demands of the Federal Treasury, the glaring inadequacy of the authorized mode of supplying it, the rapid growth of anarchy in the Federal system, and the animosity kindled among the states by their conflicting regulations." *Madison Papers*, ii, 694.

that our Union is worth this purchase." Upon that vital issue he staked all, and won all. The moment his fundamental and revolutionary concept as to taxation was accepted, all other changes followed as mere corollaries. So soon as it was settled that a new federal fabric was to be created with an independent power of taxation, it followed that such a government must be endowed with the authority to execute its own laws and decrees directly upon individuals through machinery adequate to that end. From the original concept necessarily resulted a completely organized government "with the usual branches, legislative, executive, and judicial; with the direct power of taxation and the other usual powers of a government; with its army, its navy, its civil service, and all the usual apparatus of a government, all bearing directly upon every citizen of the Union without any reference to the governments of the several states." [1]

A completely organized government a necessity.

Division of a federal state into three departments.

Webster's first great step forced him to take the second, scarcely less momentous, which involved the division of the new *federal* state into three departments — legislative, executive, and judicial — something never heard of before in the world's history. The idea of a division of a *single* state into three departments originated in England, where it appeared as the unpremeditated outcome of political evolution. As a scientific formula the maxim as to the division of powers was first expounded by Montesquieu, who accepted it in the qualified sense in which it existed in the English system.[2] In that qualified sense it passed into the first American state constitutions. As Madison has well expressed it, "On the slightest view of the British Constitution we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other." [3] Speaking of the constitution of the states he said: "If we look into the constitution of the several states, we find, that, notwithstanding the emphatical, and, in some instances, the unqualified terms in which the axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." [4] As a political dogma

Montesquieu and single states.

[1] These are the attributes which Mr. Freeman says a "composite state" must possess. *Federal Govt.*, i, 11.

[2] *Spirit of Laws*, bk. xi, ch. 6.

[3] *Federalist*, no. xlvi, p. 335.

[4] Ibid. 337.

it was first formulated in this country by George Mason in the Bill of Rights of Virginia's Constitution of 1776, which provides "that the legislative and executive powers of the state should be separate and distinct from the judiciary." But when the time came for Franklin to draft our first Federal Constitution, it never occurred to a mind even as acute as his that a *federal* state could be divided into three departments — executive, legislative, and judicial — for the simple reason that no preceding federal state had ever been so divided. In obedience to precedent the total federal power was vested and confused, under our first Constitution, in the one-chamber body known as the Congress of the Confederation. As Ford has well expressed it: "The general government, called into existence by the Articles of Confederation, which had been modeled on the Batavian and Helvetic constitutions, was but a legislative dependent of the state legislatures, with scarcely a shadow of executive or judicial power, and was therefore equally impotent to protect." [1] Pelatiah Webster in criticising the Articles of Confederation said: "1. It blended the legislative and executive powers together in one body. . . . 9. They could institute no general judiciary powers." He was to have the honor of proposing, for the first time in the world's history, the division of a *federal* government into three departments — executive, legislative, and judicial. After stating what he calls "my first great principle," after stating that his new creation must "of necessity be vested with the power of taxation," he assumes in the second place that it must be divided, as the several state governments are divided, into three departments, the separate organization of each of which he undertook to work out. Some writers, unfamiliar with Webster's work, have erroneously assumed that the necessity for such a division was first stated by Jefferson, who, in a letter to Madison written from Paris, December 16, 1786, used this language: "To make us one nation, as to foreign concerns, and keep us distinct in domestic ones, gives the outline of the proper division of powers between the general and particular governments. But to enable the federal head to exercise the powers given to best advantage, *it should be organized as the particular ones are into legislative, executive, and judiciary.*" [2] Nearly four years before, that

Definition in Virginia's Bill of Rights.

First Constitution vested all power in a one-chamber assembly.

A bicameral federal legislature.

Jefferson's indorsement.

[1] *Federalist*, Introd., p. x.

[2] See *Jefferson's Correspondence*, by T. J. Randolph, ii, 64, 65.

idea had been fully worked out in Webster's paper of February 16, 1783. On the day of its publication Jefferson was at Baltimore, and two weeks later he came for a visit to Philadelphia, after the voyage he was then contemplating to France had been abandoned.

A President surrounded by a cabinet council.

Webster proposed that the executive power should be vested in a President surrounded by a cabinet or council composed of the "great ministers of state," such President to be elected by Congress, as the President of France is now elected. "The financier manages the whole subject of revenues and expenditures, the Secretary of State takes knowledge of the general policy and internal government, the Minister of War presides in the whole business of war and defense, and the Minister of Foreign Affairs regards the whole state of the nation, as it stands related to, or connected with, all foreign powers. I mention a Secretary of State because all other nations have one, and I suppose we shall need one as much as they, and the multiplicity of affairs which naturally fall into his office will grow so fast that I imagine we shall soon be under the necessity of appointing one." Later on he says the "great ministers of state . . . shall superintend all the executive departments and appoint all executive officers, who shall ever be accountable to and removable for just cause by them or Congress, i. e., either of them." But far more notable, in the light of existing conditions, is this declaration: "I do not mean to give these great ministers of state a negative on Congress, but I mean to oblige Congress to receive their advices before they pass their bills, and that every act shall be void that is not passed with these forms; and I further propose that either house of Congress may, if they please, admit the said ministers to be present and assist in the debates of the house, but without any right of vote in the decision."

Ministers to sit in Congress without the right to vote.

The Swiss Executive.

Under the existing Swiss Constitution the executive power is vested, not in the President, but in a council or cabinet of seven, known as *Bundesrath* or *Conseil Fédéral*, which holds office for three years. The Council apportions the departments of state among its own members, and "the members of the Council have the right to speak and make proposals in either house of the Federal Legislature, but not to vote." In his famous essay upon Presidential Government,[1] from which that

[1] Freeman's *Essays*, i, 400 *sq.* (ed. 1871).

quotation is taken, Mr. Freeman says: "The Swiss Constitution has several points of likeness with that of America, and the constitution of the two houses of the Federal Legislature is clearly borrowed from the American model." After an adverse vote has occurred, the Swiss Ministers simply return to their offices and go on with their work until the end of their terms. In the light of such an example it is too clear for argument that we may adopt so much of the English cabinet system as we need and at the same time reject, as Switzerland does, that part of it which is not applicable to a federal state like our own. The great architect, with his far-seeing eye, was in favor of instituting from the very outset a closer connection than now exists between the executive and legislative powers, just such a connection as Switzerland deemed it wise to introduce in remodeling her federal legislature upon our own. The lack of such a connection is the root of the evil under which our parliamentary system is now breaking down. In the First Congress, 189 bills were introduced; in the Sixtieth, about 40,000. As the legislative business of the country has thus grown in extent and complexity the pressure upon the primitive machinery of the House of Representatives has increased until at last a crisis has been reached. As the glut of legislative timber in the channel has increased, Mr. Speaker has been endowed with first one abnormal power and then another in order that legislation may not cease altogether. But the time has now arrived when such empirical devices must be superseded by a scientific readjustment of our parliamentary machinery upon the basis Webster originally suggested. Every parliamentary system now existing in the world, except our own, which has been copied from the English, has reproduced in some form the mainspring, the driving force of the original upon which its harmony chiefly depends. That mainspring or driving force is embodied in the right of the cabinet to appear in the popular chamber for the purpose of initiating legislation upon the great questions in which the nation is vitally concerned, and then of driving such legislation to a final vote. The lack of that practical business expedient, which everybody except ourselves enjoys, and which the vast and rapidly swelling volume of our legislative business urgently demands, has produced the abnormal, almost revolutionary condition under which we now groan. The author

Ministers do not resign after adverse vote.

American Speaker armed with abnormal powers.

Right of cabinet to initiate legislation.

has been contending for years that the whole difficulty may be removed, without a constitutional amendment, by a brief act of Congress, and a modification of existing parliamentary rules to be made upon the basis of Webster's original suggestion, supplemented by the Swiss experiment now in successful operation.[1]

Webster first proposed a two-chamber Federal Congress.

Just as the state constitutions admonished Webster to split the new Federal Government into three departments, executive, legislative, and judicial, the bicameral state legislatures admonished him to split the one-chamber Congress of the Confederation into an upper and a lower house. In constructing that body on the one-chamber plan, Franklin was content to follow a model two thousand years old, but in criticising his work Webster said: "This body, viz., Congress, consisted of but one house, without any check upon their resolutions." As a remedy he proposed "that the Congress shall consist of two chambers, an upper and a lower house, or senate and commons, with the concurrence of both necessary to every act; and that every state send one or more delegates to each house. This will subject every act to two discussions before two distinct chambers of men equally qualified for the debate, equally masters of the subject, and of equal authority in the decision. These two houses will be governed by the same natural motives and interests, viz., the good of the Commonwealth, and the approbation of the people. Whilst at the same time, the emulation naturally arising between them will induce a very critical and sharp-sighted inspection into the motives of each other. Their different opinions will bring on conferences between the two houses, in which the whole subject will be exhausted in arguments pro and con, and shame will be the portion of obstinate, convicted error. . . . I am not of opinion that bodies of elective men, which usually compose Parliaments, Diets, Assemblies, Congresses, etc., are commonly dishonest; but I believe it rarely happens that there are not designing men among them; and I think it would be much more difficult for them to unite their partisans in two houses, and corrupt or deceive them both, than to carry on their designs where there is but one unalarmed, unapprehensive

His reasons for the unprecedented change.

[1] See the author's article, entitled "The Speaker and his Powers," in the *North American Review* for October, 1908.

house to be managed." Such were the terms in which the world was first addressed in favor of a federal assembly of two chambers instead of one. In commenting upon the manner in which the members should be chosen, Webster said: "The delegates which are to form that august body, which are to hold and exercise the supreme authority, ought to be appointed by the States in any manner they please; in which they should not be limited by any restrictions; their own dignity and the weight they will hold in the great public councils, will always depend on the abilities of the persons they appoint to represent them there." [1] One of the worst provisions in the Articles of Confederation was that which compelled a member to retire from Congress after he had served three years. At the height of his usefulness Madison was forced to quit on that account. In denouncing that rule Webster said: "I have no objection to the states electing and recalling their delegates as often as they please, but think it hard and very injurious both to them and the Commonwealth that they should be obliged to discontinue them after three years' service, if they find them on that trial to be men of sufficient integrity and abilities; a man of that experience is certainly more qualified to serve in the place than a new member of equal good character can be; experience makes perfect in every kind of business — old experienced statesmen of tried and approved integrity and abilities are a great blessing to a state — they acquire great authority and esteem as well as wisdom, and very much contribute to keep the system of government in good and salutary order; and this furnishes the strongest reason why they should be continued in the service, on Plato's great maxim that 'the man best qualified to serve, ought to be appointed.'" Finally he said: "It is necessary that Congress should have all usual and necessary powers of self-preservation and order, e. g., to imprison for contempt, insult, or interruption, etc., and to expel their own members for due causes, among which I would rank that of non-attendance on the house, or partial attendance without such excuse as shall satisfy the house." With a

How the delegates were to be chosen.

Old one-term rule denounced.

Congress to be armed with all necessary powers.

[1] Again he says on that subject: "As Congress will ever be composed of men delegated by the several states, it may well be supposed that they have the confidence of their several states and understand well the policy and present condition of them."

touch of grim humor he adds: "The consultations and decisions of national councils are so very important that the fate of millions depends on them, therefore no man ought to speak to such assemblies without considering that the fate of millions hangs on his tongue. . . . A man must therefore be most inexcusable who is either absent during debates, or sleeps, or whispers, or catches flies during the argument, and just rouses when the vote is called to give his yea or nay to the weal or woe of a nation." Like a steam hammer which is so nicely adjusted that it may either crush a mass of iron or crack the crystal of a watch, this august intellect could either solve the gravest and most far-reaching of human problems, or discuss with painstaking minuteness commonplace details.

Federal judiciary outlined.

While the Articles of Confederation did not attempt to create a federal judiciary, the ninth Article did provide that "the United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever," — a jurisdiction inherited from the Privy Council.[1] "Before the Revolution, the British Privy Council had adjudicated on certain questions arising betwen colony and colony."[2] Several controversies between the states were actually brought before Congress for adjudication under the foregoing Article; and in two of them — Pennsylvania *v.* Connecticut (1781) and Massachusetts *v.* New York (1784) — the agents of the contending states were directed to "appoint by joint consent commissioners or judges to constitute a court for hearing and determining the matter in question, agreeably to the 9th Article of the Confederation, which they succeeded in doing."[3]

An important count of Webster's indictment against the Articles of Confederation was that "they could institute no general judiciary powers." That difficulty he proposed to remove

[1] In Rhode Island *v.* Massachusetts, 12 Peters, 723, the Court said: "It is a part of the public history of the United States, of which we cannot be judicially ignorant, that at the adoption of the Constitution there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters and had continued from the first settlement of the colonies."

[2] Maine, *Popular Government*, p. 217, note 7.

[3] See Taylor, *Jur. and Pro. Supreme Court of the United States*, 9.

by creating a Supreme Court, and such inferior courts of law and equity as the necessities of the country might require. He outlined the Supreme Court, with jurisdiction both original and appellate, in these terms: "That the supreme authority should be vested with powers to terminate and finally decide controversies arising between different states, I take it, will be universally admitted, but I humbly apprehend that an appeal from the first instance of trial ought to be admitted in causes of great moment, on the same reasons that such appeals are admitted in all the states of Europe. It is well known to all men versed in courts, that the first hearing of a cause rather gives an opening to that evidence and reason which ought to decide it, than such a full examination and thorough discussion, as should always precede a final judgment in causes of national consequence. A detail of reasons might be added, which I deem it unnecessary to enlarge on here." Thus emerged the splendid conception of the Supreme Court of the United States as it now exists, armed not only with original jurisdiction "to terminate and finally decide controversies arising between different states," but also with an appellate jurisdiction "in causes of great moment, on the same reasons that such appeals are admitted in all the states of Europe." In due time the Court, with a double jurisdiction thus defined, held that Congress is powerless to reapportion the original and appellate jurisdictions according to the will of that body.[1] As to the inferior federal courts he contented himself with this declaration: "To these I would add Judges of Law and Chancery; but I fear they will not be very soon appointed — the one supposes the existence of law, the other of equity — and when we shall be altogether convinced of the absolute necessity of the real and effectual existence of both of these, we shall probably appoint proper heads to preside in these departments."

A Supreme Court with jurisdiction original and appellate.

Inferior federal courts of law and equity.

When our federal judicial system, as designed by Webster, found a real expounder in Marshall, one of the gravest tasks he was called upon to perform was that involved in the establishment of the constitutional supremacy of the Supreme Court over judgments of state courts denying federal rights. In the great case of Cohens *v.* Virginia,[2] presenting the solemn refusal

[1] Marbury *v.* Madison, 1 Cranch, 138.
[2] 6 Wheat. 264.

of the Virginia Court of Appeals to obey the mandate of the Supreme Court of the United States, the ultimate question involved was the supremacy of federal law. It is hard not to marvel when we see how perfectly Webster anticipated and provided for that very contingency when he said: "1. No laws of any state whatever, which do not carry in them a force which extends to their effectual and final execution, can afford a certain or sufficient security to the subject. This is too plain to need any proof. 2. Laws or ordinances of any kind (especially of august bodies of high dignity and consequence), which fail of execution, are much worse than none. They weaken the government, expose it to contempt, destroy the confidence of all men, native and foreigners, in it, and expose both aggregate bodies and individuals who have placed confidence in it to many ruinous disappointments which they would have escaped had no law or ordinance been made; therefore, 3. To appoint a Congress with powers to do all acts necessary for the support and uses of the Union; and at the same time to leave all the states at liberty to obey them or not with impunity, is, in every view, the grossest absurdity. . . . Further I propose, *that if the execution of any act or order of the supreme authority shall be opposed by force in any of the states* (which God forbid), it shall be lawful for Congress to send into such state a sufficient force to suppress it. On the whole, I take it that the very existence and use of our Union essentially depends on the full energy and final effect of the laws made to support it, and therefore I sacrifice all other considerations to this energy and effect, and if our Union is not worth this purchase, we must give it up — the nature of the thing does not admit of any other alternative."

Webster defined supremacy of federal law.

Remedy when resisted by force in any state.

Webster was no more eager to arm his new federal creation with supremacy in the event that its laws or mandates should be defied by the states than he was to guard against its intrusion such rights as the states reserved to themselves. Nothing could be more explicit on that subject than these declarations: "II. But now the great and most difficult part of this weighty subject remains to be considered, viz., how these supreme powers are to be constituted in such manner that they may be able to exercise with full force and effect the vast authorities committed to them for the good and well being of the United

Reserved rights of states carefully guarded.

States, and yet be so checked and restrained from exercising them to the injury and ruin of the states that we may with safety trust them with a commission of such vast magnitude — and may Almighty Wisdom direct my pen in this arduous discussion. . . . I propose further that the powers of Congress, and all the other departments acting under them, shall all be restricted to such matters only of general necessity and utility to all the states as cannot come within the jurisdiction of any particular state, or to which the authority of any particular state is not competent, so that each particular state shall enjoy all sovereignty and supreme authority to all intents and purposes, excepting only those high authorities and powers by them delegated to Congress for the purposes of the general union." Let us place in juxtaposition with that ample statement the meagre terms of the Tenth Amendment, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." According to Webster's conception of it the new federal system was to be one of delegated and strictly limited powers, and yet one absolutely supreme within the limits of its jurisdiction as ultimately defined by its own tribunals. From the very nature of such a system, which has no prototype in history, was deduced the judge-made right to declare void a national law when the federal courts conclude that such a law is in conflict with the Constitution itself. The invincible logic employed by Marshall in the first assertion of that right rested necessarily on the admission that it is a mere deduction from the general nature of a system of government whose Constitution does not undertake to grant it in express terms.

Webster's statement far more ample than Tenth Amendment.

Thus with a fullness and lucidity that could hardly have been surpassed in a first effort, Pelatiah Webster, on February 16, 1783, just four years and three months before the Federal Convention of 1787 met, gave to the world, as his invention, the entirely new plan of federal government now embodied in the existing Constitution of the United States. This greatest of all contributions to modern political science was laid at the doors of the Congress of the Confederation just at the moment when a final judgment of condemnation was about to be pronounced against the old quota system as a practical

Great invention synchronizes with failure of quota system.

means of raising revenue. The cessation of hostilities with Great Britain, followed as it was by the signing of the preliminary articles of peace at Paris, January 20, 1783, had brought the financiers of the Revolution face to face with the mighty problem of providing, without any visible or reliable means, for the debts that represented the cost of victory. In estimating that cost Congress said: "The amount of these debts, as far as they can now be ascertained, is forty-two millions three hundred and seventy-five dollars. . . . The amount of the annual interest is computed to be two millions four hundred and fifteen thousand nine hundred and fifty-six dollars. Funds, therefore, which will certainly and punctually produce this sum at least must be provided." In attempting to provide such funds Congress, after frankly admitting the inadequacy of the quota system, appealed to the states so to amend the Articles of Confederation as to permit Congress to levy a tax on imports, for the term of twenty-five years, in such a way as to produce annually the sum of "nine hundred and fifteen thousand nine hundred and fifty-six dollars. . . . The residue of the computed interest is one million five hundred thousand dollars, and is referred to the states to be provided for by such funds as they may judge most convenient." [1] Since February 3, 1781, Congress had been imploring the states to make such a concession; and its prayer would have been answered had it not been for the action of Rhode Island whose assembly on November 1, 1782, unanimously refused to concede to the Confederation the right to raise revenue by duties on imports. That refusal was based on three grounds: (1) because such an impost would bear hardest on the commercial states, particularly upon Rhode Island; (2) because it would involve the introduction of officers unknown to the Constitution; (3) because a revenue for the expenditure of which Congress is not to be accountable to the states would render that body independent of its constituents, and would be dangerous to the liberties of the United States.[2] Thus was revealed the terrible power of a single state to destroy any attempt to create a uniform commercial or financial system by an arbitrary or selfish

Lack of power in Congress to levy a tax on imports.

Rhode Island's veto.

[1] *Madison Papers*, i, Appendix no. 2, vi–viii.

[2] Bradford, the Speaker, to the President of Congress, Nov. 30, 1782. *Records of Rhode Island*, ix, 682, 683, 684.

veto. From that obstinate and destructive attitude Rhode Island never receded, despite Washington's circular letter to the governors of all the states,[1] urging the necessity of granting to Congress some power to provide a national revenue, and despite Congress's frantic appeal to the states, in the final resolution of April 18, 1783,[2] for power to levy specific duties on certain enumerated articles, and five per cent on others. Even the imploring answer made by Hamilton, Madison, and Fitzsimons to Rhode Island's objections, was all in vain.[3] Her fortunate refusal to listen to reason was the death knell to the Confederation. After she succeeded in defeating the final attempt to secure a revenue to be derived from imports as embodied in the resolution of April 18, 1783, — to which some of the states gave an unqualified, and others a conditional approval, — compliance with the requisitions grew more and more lax, until at last in 1786 a committee of Congress reported that any further reliance on requisitions would be "dishonorable to the understanding of those who entertain such confidence." [4] The last stage of the expiring system has already been depicted in the despairing words of Hamilton, who said in the speech delivered in the legislature of New York in February, 1787: "Connecticut and New Jersey have almost formally declined paying any longer. The ostensible motive is the nonconcurrence of this state in the impost system. The real one must be conjectured from the fact. Pennsylvania, if I understand the scope of some late resolutions, means to discontinue the interest she pays upon her assumption to her own citizens; in which case there will be little coming from her to the United States. This seems to be bringing matters to a crisis. The pecuniary support of the Federal Government has of late devolved almost entirely upon Pennsylvania and New York. If

Death knell of Confederation.

[1] He declared that it was the duty of the states, without "hesitating a single moment," to give their sanction to the act of Congress establishing a revenue for the United States.

[2] *Madison Papers*, i, 447.

[3] Ibid., Appendix no. 3, xii–xix.

[4] *Journals of Congress*, iv, 619. In that report the committee said they were "seriously impressed with the indispensable obligation that Congress are under of representing to the immediate and impartial consideration of the several states the utter impossibility of maintaining and preserving the faith of the Federal Government by temporary requisitions on the states, and the consequent necessity of an early and complete accession of all the states to the revenue system of the eighteenth of April, 1783."

Pennsylvania refuses to continue her aid, what will be the situation of New York? Are we willing to be the Atlas of the Union? or are we willing to see it perish?" In bringing about that desperate condition of things which forced the meeting of the Federal Convention of 1787, Rhode Island was really a benefactor in disguise. In demonstrating through her selfish and irrevocable veto the worthlessness and danger of the ancient quota system she paved the way for the acceptance of the epoch-making invention of February 16, 1783, which was destined to revolutionize federalism as a system of government not only in this country but throughout the world.

A benefactor in disguise.

Continental Congress in 1783;

As that invention was finally presented to the Federal Convention by three brilliant young members of the Congress of the Confederation, it will be helpful to glance at the character and composition of that body at the time Pelatiah Webster published his entirely new plan of federal government at its very doors.[1] The record of a vote taken on February 14, 1783, shows that the following delegates were then present: New Hampshire, Gilman and White; Massachusetts, Holten and Gorham; Rhode Island, Collins and Arnold; Connecticut, Wolcott and Dyer; New York, Floyd and Hamilton; New Jersey, Boudinot, Elmer, and Condict; Pennsylvania, Mifflin, Fitzsimons, Wilson, and Montgomery; Maryland, Carroll; Virginia, Jones, Madison, Bland, Lee, and Mercer; North Carolina, Hawkins and Williamson; South Carolina, Rutledge, Ramsay, Izard, and Gervais. Certainly no public assembly was ever in greater need of a guiding mind or a guiding hand. At the date in question the Congress was fading surely, and not very slowly, into the shadow of a name; its decadence was already so marked that men of the first class were with difficulty

its decadence.

[1] The Congress was then sitting at Philadelphia in the chamber in the State House since known as Independence Hall. The title-page of Pelatiah Webster's "Dissertation" shows that it was "Printed and sold by T. Bradford, in Front Street, three Doors below the Coffee House, MDCCLXXXIII." The Coffee House "was known as the London Coffee House, at the corner of Front Street and High Street (now Market Street). The exact distance between the doors of the State House from Chestnut Street above Fifth, where Congress was sitting in 1783 and the Coffee House referred to in the Bradford Imprint, was five blocks, four of them being on Chestnut Street, and one of them being the distance between High Street and Chestnut Street." For these facts I am indebted to the kindness of Hampton L. Carson, Esq., the eminent Philadelphia jurist.

persuaded to permit themselves to be chosen members of it; long after the day named for the commencement of a session no quorum would be present until at times it seemed as if the government would become simply non-existent; delegations from certain states often failed to attend altogether.[1] On February 21, 1783, it was "resolved, that it be recommended to the states of Delaware, Maryland and Georgia to send delegates immediately to the Congress, and to each state in the Union, to keep up a constant representation." That resolution was prompted by the fact that the divisions during the earlier part of that month had disclosed that only twenty-seven delegates were present from eleven states.[2] Of the fourteen Presidents of the Congress between 1774 and 1789 only Randolph, Hancock, and Laurens are remembered in a popular way in that capacity; Jay, St. Clair, Mifflin, and Lee are remembered for other things; while Griffin, Hanson, Gorham, and Boudinot are scarcely remembered at all, except by special students of American history.[3] The last named was President on June 21, 1783, when Congress, after being driven from Philadelphia by a handful of drunken soldiers, fled across the river to Princeton where the college offered shelter. Thence it skipped about to Annapolis, to Trenton, to New York,[4]

Only twenty-seven delegates from eleven states.

Its wanderings.

[1] Morse, *Life of Hamilton*, 1, 96, 97, 202.

[2] MS. Records of the Continental Congress.

[3] See *The Critical Period*, 99.

[4] The Congress of the Revolution first met in Philadelphia, Pa., on September 5, 1774, and remained there until Wednesday, December 12, 1776, when it adjourned to Baltimore, Md., in consequence of the approach of the British army. It met in Baltimore Friday, December 20, 1776, and remained there until February 27, 1777, when it adjourned to Philadelphia, where it met on the 4th of the next March and adjourned from day to day until the 12th of that month. On the 18th of September, 1777, military necessity again led to its removal from Philadelphia. It thereupon adjourned to Lancaster, Pa., where it met on Saturday the 27th of that month, and on the same day adjourned to meet at York in the same state, at which place it assembled on Tuesday the 30th of the same month. It remained in York until Saturday, June 27, 1778, when, in view of the evacuation of Philadelphia by the British, it adjourned to that city, where it held its next session on Thursday, July 2, 1778. It remained in Philadelphia until June 21, 1783, when in consequence of the menacing demonstration toward it by the unpaid soldiers of the Revolutionary Army, it adjourned to meet either at Trenton or Princeton, N. J., as the President might direct. Upon the summons of the President it met at Princeton on the 30th of June and continued to hold its sessions there until November 4, 1783. On November 26, 1783, it met

until it became a laughing-stock, and its wanderings the subject of newspaper squibs. And yet, despite its weakness, irresolution, and gloom, this nondescript assembly — so rich in duties and responsibilities and so poor in powers and resources — was blessed during the critical period by the presence of three rising young statesmen who would have adorned any age or any country. James Madison had taken his seat as a working member as early as March 20, 1780; Alexander Hamilton came to divide the honors with him in November, 1782; Charles Pinckney did not arrive until November, 1784. On the day Pelatiah Webster laid his wholly novel plan of a federal government at the doors of Congress, Madison, then thirty-two, and Hamilton, then twenty-six, were present at Philadelphia deeply absorbed in the discussion of the problem of problems it was destined to solve. No biographer of Madison, Hamilton, or Pinckney has ever claimed that, down to that time or for at least four years thereafter, either one of them ever proposed or formulated any kind of a new constitution. And certainly prior to February 16, 1783, no one of them had, by any public act in Congress, attempted to bring about the calling of a federal convention armed with the power to make a new constitution. Such were the conditions under which Madison and Hamilton were brought face to face at Philadelphia with the bold innovator who, after proposing as early as 1781 that a "Continental Convention" should be called for the making of a new constitution, gave to the world,

Madison, Hamilton, and Pinckney.

in Annapolis, Md., where it remained until June 3, 1784. It next met in Trenton, N. J., from November 1, 1784, until December 24, 1784, when it adjourned to meet in the city of New York. It met in New York City on January 11, 1785, and continued to meet there until March 4, 1789, when it was succeeded by the Congress provided for in the Constitution. The Congress provided for by the Constitution first met in New York City. The first Wednesday, which was the 4th day of March, 1789, was the day appointed by the resolution of September 12, 1788, for "commencing proceedings" by the Congress provided for by the Constitution, and several members of each house were present on that day, but no quorum appeared in the House of Representatives until the 1st of April, 1789, nor in the Senate until the 6th of that month. On December 6, 1790, Congress removed to Philadelphia, chosen by the act of July 16, 1790, as the temporary seat of government until its removal to the District of Columbia where Congress actually met for the first time on November 21, 1800, in the north wing of the Capitol, then the only completed part of the building. See *Origin and Government of the District of Columbia*, 12–13, 57, 102.

as his invention, an entirely new plan of federal government worked out in detail.

Webster and Hamilton as financiers and economists.

There can be no question that Webster and Hamilton possessed the most original and creative minds of that epoch, so far as finance and economics were concerned. Robert Morris, a skillful administrator of finance, was not in their class as a thinker. It is interesting to see how it was that Webster and Hamilton made Morris possible. Professor Sumner, who has written the best book on the finances of the Revolution, told the whole story when he said: "In February, 1780, Pelatiah Webster urged the appointment of a financier, that is of a competent single officer to take charge of the finances, in place of the committees or boards who had hitherto been intrusted with them.[1] In September of the same year Alexander Hamilton urged the same view, that there should be single responsible heads of the great departments, 'Mr. Robert Morris would have many things in his favor for the department of finance.'" [2] Again Professor Sumner says: "Pelatiah Webster asserted in 1785, that forty or fifty per cent more could be obtained for labor and country produce than in 1774. Hamilton said that labor was much dearer in 1782 than before the war." [3] Such was the perfectly normal relation existing between the mature and experienced financier and economist of fifty-seven and the brilliant and precocious young statesman of twenty-six. Gifted as they both were by nature, the advantage of thirty-one years in age and experience made the one the teacher, the leader of the other. Nothing is more creditable to the young man of action than the decisive promptness with which he followed after his leader had blazed the way. Madison says Webster was the first to propose the calling of a Federal Convention, in 1781; in July, 1782, the legislature of New York passed resolutions, "which Hamilton probably drafted,"[4] inviting Congress "to recommend and each state to adopt the

Prof. Sumner describes their relations.

How Webster forces the calling of the Federal Convention of 1787.

[1] In his preface (iii), Professor Sumner says: "The finances of the Continental Congress had no proper boundary. In one point of view they seem never to have had any finances; in another the whole administration was financial."

[2] *The Financier and the Finances of the American Revolution*, i, 260–261; Hamilton's *Works*, i, 215.

[3] Ibid., ii, 180, 181.

[4] Bancroft, *History of the Constitution*, i, 38–39 and note: "The grounds for believing Hamilton to have been the draughtsman of the resolutions are solely the circumstances above related, and that the language bears his impress."

measure of assembling a general convention of the states specially authorized to revise and amend the Confederation." On February 16, 1783, Webster published at Philadelphia the programme that convention was to adopt; and on April 1 of that year Hamilton expressed in Congress, *for the first time*, his desire "to see a general convention take place, and that he would soon, in pursuance of instructions from his constituents, propose to Congress a plan for that purpose." [1] On April 28, and "*so far as the records show never till then*," Congress appointed a Committee on pending resolutions in favor of a general convention.[2] Madison soon followed in the same path. As he tells us himself: "In a letter to James Madison from R. H. Lee, then President of Congress, dated the twenty-sixth of November, 1784, he says: 'It is by many here suggested as a very necessary step for Congress to take, the calling on the states to form a Convention for the sole purpose of revising the Confederation, so far as to enable Congress to execute with more energy, effect, and vigor the powers assigned to it, than it appears by experience that they can do under the present state of things.' The answer of Mr. Madison remarks, 'I hold it for a maxim, that the union of the states is essential to their safety against foreign danger and internal contention; and that the perpetuity and efficiency of the present system cannot be confided in. The question, therefore, is, in what mode, and at what moment, the experiment for supplying the defects ought to be made.'" [3] In the very month in which Madison thus answered Lee's letter, Charles Pinckney, who was a year younger than Hamilton, took his seat in Congress, there to remain until 1787. Thus were united in the work of the Continental Congress, during the critical period, Madison, Hamilton, and Charles Pinckney, the three youthful statesmen who were to take to the Federal Convention of 1787 — after more than four years of study and reflection upon it — the essence of Webster's epoch-making invention in the form of "plans," which, as drafted by Hamilton and Pinckney, were elaborate systems of government. At every step the three younger men marched behind their great intellectual leader, who, alone of all

Charles Pinckney comes upon the scene.

Madison, Hamilton, and Pinckney marched behind Webster.

[1] *Madison Papers*, i, 429–430.
[2] Bancroft, *Hist. of the Const.*, i, 105.
[3] *Madison Papers*, ii, 707–708.

the men of that epoch, clearly understood, as early as 1781, that the amending of the Articles of Confederation was a chimera. Webster tells us that even then he "was fully of opinion (though the sentiment at that time would not very well bear) that it would be ten times easier to form a new constitution than to mend the old one. I therefore sat myself down to sketch out the leading principles of that political constitution, which I thought necessary to the preservation and happiness of the United States of America, which are comprised in this Dissertation." [1]

[1] See Dexter's *Yale Biographies and Annals*, ii, 97 to 102, for a sketch of Pelatiah Webster, with enumeration of twenty-seven of his publications. There the statement is made that "it is a matter of tradition that members of Congress, especially the Connecticut delegates, were in the habit of passing the evening with him, to consult him upon financial and political concerns." Here the author desires to make acknowledgments to Mr. David K. Watson, who, in his notable treatise on "The Constitution of the United States," recently published, has made prompt recognition of a part of what is due to Pelatiah Webster. After congratulating himself upon the opportunity afforded by Congress for inspecting the epoch-making paper of February 16, 1783, he says: "In that pamphlet Mr. Webster undoubtedly outlined to a certain degree the Constitution as it was subsequently adopted." (Vol. i, p. 81.)

# CHAPTER VII

## THE FEDERAL CONVENTION OF 1787 AND ITS WORK

Attempts to solve a mighty problem with main factor omitted.

As all preceding attempts to dramatize the proceedings of the Federal Convention have carefully excluded the leading actor from the stage, they have necessarily resulted in painfully accurate reproductions of the play of "Hamlet," with Hamlet left out. Such attempts to solve a mighty problem with the main factor omitted have involved the employment of fabulous stories and misty theories in conflict with experience and common sense. In the light of the documentary evidence now available, such expedients are no longer necessary. Admitting that the Convention performed "the most wonderful work ever struck off at a given time by the brain and purpose of man," it is now quite obvious that no supernormal processes, no miraculous interventions entered into the result. Something very nearly akin to the miraculous happens whenever, at a turning-point in the world's history, some specially gifted human being gives birth to an idea that ripens into an immortality. That kind of a miracle happened when on February 16, 1783, an intensely practical man, of wonderful insight and with a genius for finance, announced an entirely new plan of federal government in which the centre of gravity is vested in the corporate person of the federal body and not in the states composing the aggregate. In a word, the transition from the ancient type of a "confederated state," resting on the old quota system, to the new type of a "composite state," operating directly upon every citizen, was brought about by a readjustment of the taxing power on an entirely new basis. If the bringing about of that transition may be called a miracle, it was a miracle of finance. It is not therefore strange that it should have been performed by a financier equally familiar with the theoretical and practical sides of his subject. Certainly after that event nothing that can be called miraculous occurred. The problem that remained simply involved the arduous task of adapting, through ordinary human agencies, to the most difficult and complex conditions, an invention whose

A miracle of finance.

The financier of the Revolution.

basic principle is so simple that the wonder is that it had to be discovered at all. With all the antecedents clearly in view, an attempt will be made to draw out, in a simple and natural way, the processes through which the Convention completed, with brilliant success, a work of adaptation beset with such obstacles as only an impending catastrophe could have removed.

Hamilton's move for Federal Convention stimulated by Webster.

Emphasis has been given already to the fact that the publication of Webster's entirely new plan of federal government on February 16, 1783, was followed, on April 1, by Hamilton's first move for a Federal Convention; and that on April 28, Congress, "and so far as the records show never till then," appointed a committee on the New York resolutions, then nine months old, in favor of such a Convention. When in June Washington's circular letter to the governors of the states expressed the belief "that there should be lodged somewhere a supreme power to regulate the general concerns of the confederated republic, without which the Union can not be of long duration," the newspapers of the day took up the cry and demanded a revision "not by Congress, but by a Continental Convention, authorized for the purpose." [1] But before the echo of that appeal died away, Congress pointedly declined to take the initiative. When in September Adams and Franklin attempted to pave the way for a better union, a special committee, of which Arthur Lee was a member, was appointed, which reported that "as the several states are sovereign and independent, and possess the power of acting as may to them seem best, Congress will not attempt to point out the path. The mode for joint effort will suggest itself to the good sense of America." [2] The good sense of America declined, however, to take up the task in earnest until the spur of commercial and financial necessity became so sharp that it could be resisted no longer.

Congress declined to take the lead.

Joint commissioners of Virginia and Maryland, 1785.

The last stage of the good work really began on March 28, 1785, when the joint commissioners of Virginia and Maryland [3] met at Mt. Vernon to arrange, under the auspices of

[1] See *Philadelphia*, July 3, 1783; Maryland *Gazette*, July 11. In a letter to Dr. William Gordon, 8th July, 1783, MS., Washington did not hesitate to express his "wish to see energy given to the federal constitution by a convention of the people." Bancroft, i, 113.

[2] Reports of committees on increasing the powers of Congress, 95, MS.

[3] George Mason and Alexander Henderson of Virginia; Daniel of St. Thomas Jenifer, Thomas Stout, and Samuel Chase of Maryland.

Washington, the terms of a compact between the two states for the jurisdiction over the waters of the Chesapeake Bay and the rivers common to both states, coupled with a request to Pennsylvania to grant the free use of the branches of the Ohio within its limits, so as to establish the connection between that river and the Potomac.

The primary work of the commissioners being thus performed, they passed on to wider subjects of policy and recommended to the states in question uniformity of commercial regulations, uniformity of duties on imports, and uniformity of currency.[1] At that moment the country was distracted by commercial conflicts which made it imperative that Congress should be armed with adequate power to regulate trade. Something had to be done to prevent the enactments of one state to the injury of the trade of the other, and to establish a system intelligible to foreigners trading with this country. Each state was attempting to regulate commerce on its own account and in its own interest. In 1785 New York laid a double duty on all goods whatever imported in British ships; and in the same year Pennsylvania passed the first of a series of tariff acts, designed to tax the whole community for the benefit of a few manufactures. In the midst of it all, Washington wrote: "If the states individually attempt to regulate commerce, an abortion or a many-headed monster would be the issue. If we consider ourselves or wish to be considered by others a united people, why not adopt the measures which are characteristic of it, and support the honor and dignity of one? If we are afraid to trust one another under qualified powers, there is an end of the Union." [2]

State tariffs of 1785.

At that critical juncture it was that the ever vigilant and patriotic Madison hit upon an expedient. When on December 5, Maryland gave her adhesion to the compact regulating the jurisdiction of the waters of Chesapeake Bay and the Potomac, her legislature sent a communication to that of Virginia proposing that commissioners from all the states should be invited to meet and regulate the restrictions on commerce

[1] Cf. Rives's *Life of Madison*, ii, 58; *Madison Papers*, ii, 696.

[2] Washington to Stuart, 30th Nov., 1785. When Washington was invited to suggest, he said: "The proposition is self-evident. We are either a united people or we are not so. If the former, let us in all matters of national concern act as a nation which has a national character to support." Sparks, ix, 145, 146.

for the whole. After Virginia had responded promptly to the action of Maryland, by enacting equally liberal legislation as to jurisdiction over the waters in question,[1] Madison, having in view "a politico-commercial commission" for the continent, at once prepared a motion to the effect that commissioners from all the states should be invited to hold a meeting in order to discuss the best method of securing a uniform treatment of commercial questions. With consummate craft he put his motion into the hands of John Tyler, a zealot for the independence of the states, who happened to agree with him on that question; and on January 21, 1786, it passed both branches of the Virginia legislature by a large majority.[2]

Annapolis Convention of 1786.

The result was the invitation to the commissioners of all the states to meet in September of that year in the trade convention at Annapolis, from which proceeded, as heretofore explained, the call for the more famous body that assembled at Philadelphia in May, 1787. The irresistible commercial and financial movement proceeding from the states which thus forced the meeting of the Federal Convention received tardy and reluctant recognition from Congress itself. After the Annapolis Convention had fixed the time and place, the Massachusetts delegation, led by King, prevented the recommendation of the measure which the deputations at Annapolis asked for. Not until Virginia, New Jersey, Pennsylvania, North Carolina, and Delaware had spoken affirmatively did King begin to see the error of his way. What really appealed to him was the fact that "events are hurrying us to a crisis. Prudent and sagacious men should be ready to seize the most favorable circumstances to establish a more perfect and vigorous government."[3] Thus impelled, he offered, before the end of February, 1787, a motion, accepted without opposition, which, while carefully ignoring the act of the meeting at Annapolis, recommended as an original measure a convention to meet at the same time and place.[4] The impending crisis that drove King to this action deepened with the increasing perplexities that seemed to culminate just at that moment. Alarm grew into consternation as Shays's Rebellion in Massachusetts, the riots in Vermont and New Hampshire, the "Know Ye" meas-

Federal Convention of 1787.

Its meeting forced by events.

[1] Hening, xii, 50, 55.
[2] *Madison Papers*, ii, 694–695.
[3] Austin's *Gerry*, ii, 3, 4, 7, and 8.
[4] *Journals*, iv, 723; *Madison Papers*, ii, 587, 619, 620.

ures of Rhode Island, the paper-money craze in so many states, the quarrel with Spain, and the imminent danger of separation between North and South consequent thereon, seemed to struggle together in the effort to produce anarchy. And, last and most of all, less than three months before the time fixed for the meeting at Philadelphia the State of New York, the one financial prop of the Confederation, after an impassioned appeal by Hamilton in the legislature, on February 15, 1787, so clogged her assent to the amendment endowing Congress with the power to levy customs duties and to appoint the collectors as to defeat it. Thus Congress was decisively informed by New York, as it had long ago been informed by Rhode Island, that it would never be armed with any effectual means for raising revenue. In the midst of the deepening gloom, and under the pressure of a common danger, all the states took part in the proceedings at Philadelphia except self-centred Rhode Island, which failed to send delegates.

Imperious necessities of commerce and finance.

No mind accustomed to follow the swelling streams of causation as they flow through the forest of interdependent historical facts should find it difficult to perceive that it was the imperious necessities of commerce and finance that drove the states together in the famous assembly that completed the second Constitution of the United States. How imperious such necessities were can only be understood in the presence of the opposing forces they were obliged to overcome. The people that dwelt in the straggling and long-drawn-out series of republics then fringing our Atlantic seaboard, so far from being inspired by a common sentiment of union, the after-growth of a later time, were filled with an intensely provincial spirit to which local self-interest appealed in many forms. It was that jealous spirit of local self-interest that refused to the last to arm the Congress of the Confederation, even to a limited extent, with the power to tax; it was that spirit that refused to the last so to arm Congress with the power to regulate trade as to enable it to crush out the interstate tariff wars then paralyzing commerce, foreign and domestic. In the presence of such conditions it is not strange that the British Order in Council of the 2d of July, 1783, should have been "issued in full confidence that the United States cannot agree to act as one nation";[1] it is not strange that the British Ambassador at Paris,

The jealous spirit of local self-interest.

[1] See letter of John Adams to Congress, *Dip. Cor.*, vii, 81, 88, 100.

when he was notified by the American Commissioners in 1784,[1] that they had full powers to negotiate a commercial treaty with Great Britain, should have replied, after consulting with English merchants trading with North America, that "the apparent determination of the respective states to regulate their own separate interests renders it absolutely necessary, toward forming a permanent system of commerce, that my court should be informed how far the commissioners can be duly authorized to enter into any engagements with Great Britain, which it may not be in the power of any one of the states to render totally fruitless and ineffectual." Josiah Tucker, Dean of Gloucester, reputed to be a sagacious man, simply expressed the general view of European statesmen when he said: "As to the future grandeur of America, and its being a rising empire under one head, whether republican or monarchical, it is one of the idlest and most visionary notions that ever was conceived even by writers of romance." How could a contrary conclusion be reached by those who knew that the long and discreditable history of federalism as a system of government had been carried to the verge of the grotesque by the first and pending American experiment?

Josiah Tucker's statement.

In the midst of the midnight there was but a single star, and that was visible only to the eyes of the elect. To those watchers of the skies it came like a new planet when, on February 16, 1783, the great one laid at the doors of the Congress an entirely novel yet complete solution of the mighty problem by which they were mastered and overcome. No invention of the human mind was ever more distinctly removed from all rivalry by the isolation surrounding its birth. No sane or serious person will contend that it had been preceded by any prototype whatever; and not until about four years after its appearance was any attempt made to reproduce it in any form. While it thus stood forth in the solitude of its own originality, it was seized upon by three youthful statesmen, Madison, Hamilton, and Charles Pinckney, who, after restating it in the form of more or less complete systems of government, made it the basis of the proceedings of the Federal Convention of 1787. Is it a matter of wonder that the greatest

Isolation surrounding Webster's invention.

[1] The American Commissioners for negotiating treaties were John Adams, Franklin, and Jefferson; the British Ambassador at Paris was the Duke of Dorset.

financier and economist of the age should have solved the gravest financial and commercial problem presented by that age? Is it a matter of wonder that a Convention forced together by the pressure of an impending catastrophe brought on by acute commercial and financial conditions should have seized upon the only remedy ever offered as an alleviation of them? In the year in which the Declaration of Independence was made, Adam Smith discredited the economic policy of the past and promoted the overthrow of worn-out institutions by the publication of the "Wealth of Nations"; "perhaps," as Mackintosh has declared, "the only book which produced an immediate, general, and irrevocable change in some of the most important parts of the legislation of all civilized states." Seven years later Pelatiah Webster practically abolished the ancient type of a federal league resting on the quota system, as it had existed for over two thousand years, and established in its stead the new type of a composite state which has become universal. It was a time of transition, of change from the past to the present, during which such achievements were possible. So complete, so finished was Webster's performance that the work of the Convention in its larger aspect was reduced to a choice between two alternatives. It had either to perpetuate the old and discredited system by adopting the plan of an amended Confederation, as presented by Paterson; or it had to adopt the path-breaking invention, "the wholly novel theory" presented to it with variations in detail by Madison, Hamilton, and Pinckney. In the mighty conflict of forces the old provincial spirit, strong as it was, was crushed, only by the threat of the deluge. After the Paterson plan had been swept away, the only question that remained was as to the form in which the great invention, as embodied in the so-called plans of Madison, Hamilton, and Pinckney, should be transformed into a working system of government. With that clue to the labyrinth it will be comparatively easy to follow the details of the proceedings of the Convention subsequent to the introduction of the four plans, as the records now available are, with a few exceptions, fairly complete and accurate.

Adam Smith and his work.

Alternatives presented to Convention.

Summary. An earnest effort has now been made to demonstrate that an irresistible popular movement, driven on by the pressure of commercial and financial necessity, finally forced the Continental Congress to acquiesce at a specially critical moment in

the calling of a Federal Convention; that the progressive statesmen of the time went to that Convention, under the leadership of Washington, resolved to break away from the past by adopting an entirely new plan of federal government upon which they had been reflecting for more than four years; that Madison, Hamilton, and Pinckney, who were necessarily familiar with that plan from the day it was published under their very eyes, had, after prolonged study, formulated it in more or less elaborate systems of government of which particular descriptions have been given already. Only in the light of these conclusions, proven hardly more distinctly by the documentary evidence than by the elementary rules of common sense, is it possible to account for the fact that "the most wonderful work ever struck off at a given time by the brain and purpose of man" was entirely performed, from start to finish, within the narrow limits of eighty-six working days. The table here appended will remove all controversy as to that point. Pursuant to call, the Convention met May 14, 1787. There was no quorum present until Friday, May 25. The Convention then sat as follows: —

Convention worked only eighty-six days.

| | Su. | M. | Tue. | W. | Th. | F. | Sat. | |
|---|---|---|---|---|---|---|---|---|
| May | | | | | | 25 | | |
| | | 28 | 29 | 30 | 31 | | | = 5 days |
| June | | | | | | 1 | 2 | |
| | | 4 | 5 | 6 | 7 | 8 | 9 | |
| | | 11 | 12 | 13 | 14* | 15 | 16 | |
| | | 18 | 19 | 20 | 21 | 22 | 23 | |
| | | 25 | 26 | 27 | 28 | 29 | 30 | = 26 days |
| July | | 2 | | | 5 | 6 | 7 | |
| | | 9 | 10 | 11 | 12 | 13 | 14 | |
| | | 16 | 17 | 18 | 19 | 20 | 21 | |
| | | 23 | 24 | 25 | 26 | | | = 20 days |
| August | | 6 | 7 | 8 | 9 | 10 | 11 | |
| | | 13 | 14 | 15 | 16 | 17 | 18 | |
| | | 20 | 21 | 22 | 23 | 24 | 25 | |
| | | 27 | 28 | 29 | 30 | 31 | | = 23 days |
| September | | | | | | | 1 | |
| | | 3 | 4 | 5 | 6 | 7 | 8 | |
| | | 10 | 11* | 12 | 13 | 14 | 15 | |
| | | 17 | | | | | | = 14 days |
| | | | | | | | | 88 days |
| Deduct 14* and 11* | | | Met and adjourned | | | | | 2 days |
| | | | Worked | | | | | 86 days |

This table was prepared by my friend, Mr. Justice Shackelford Miller of the Kentucky Court of Appeals, a master of the history of the Convention.

Absurdity of inspiration theory.

Even if the explicit and voluminous documentary evidence did not establish the contrary, nothing could be more grotesque, more chimerical, than the assumption that the assembly met under the spell of some kind of inspiration that enabled it not only to make, as a corporate act, an epoch-making invention in political science, but to elaborate it as a working system of government within the span of eighty-six working days. The moment the inspiration theory is set aside, the fact appears that the three plans out of which the finished product grew had been carefully elaborated some time beforehand by three minds, that took from the common source open to all the four basic principles first announced on February 16, 1783. Those basic principles are (1) a *federal* government with the independent power of taxation; (2) the division of the *federal* head into three departments, legislative, executive, and judicial; (3) the division of the *federal* legislature into two chambers; (4) a *federal* government with delegated powers operating directly on the citizen, the residuum of power remaining in the states. It is no exaggeration to say that Webster's creation based on those four novel principles was as different from any preceding federal system as a modern mogul engine is from an ancient stage-coach. When the documents containing the plans as drafted by Madison, Hamilton, and Pinckney are placed in juxtaposition with the original paper of February 16, 1783,[1] a mere comparison settles the fact that the great invention, which is the basis of all of them, was drawn by each from the common source. And yet after that claim has been fully admitted, as it will be by every honest and reasonable mind, the fact remains that the master builders, who transformed under the most difficult circumstances possible the dream of the great architect into a working system of government, achieved a result as remarkable as the invention itself. As time goes on, it becomes more and more necessary that every patriotic American, no matter whether he is a student of the Science of Politics or not, should study the history of the eighty-six days so minutely as to enable him to view, as a connected whole, the most thrilling and important political drama ever enacted on the stage of the world.

The four new principles.

Relation between architect and master builders.

Tacitus tells us that the Teutonic warriors made it a habit

[1] See Appendices XI, XII, XIII, and XIV.

never to meet in the state assembly at the time appointed lest punctuality should look like obedience. True to the ancient tradition the members of the Federal Convention who were summoned for the 14th of May did not gather at Philadelphia in sufficient numbers to do business until the 25th. At the hour appointed for opening the Convention on the 14th, Virginia and Pennsylvania, the only states sufficiently represented, appeared at the State House, and, with others as they arrived, adjourned from day to day. On the 17th, South Carolina appeared on the floor; on the 18th, New York; on the 21st, Delaware; on the 22d, North Carolina; and finally on the 25th, New Jersey, the last of the seven states necessary to form a house.[1] As guide, councilor, and friend of them all came George Washington, who was met at Chester by public honors that followed him to Philadelphia, where he was escorted by the city light horse amid the chiming of bells that announced the beginning of a new national life. He had come with a firm resolve to break with the past. In a then recent letter to Madison he had said, "My wish is that the Convention may adopt no temporizing expedients, but probe the defects of the Constitution to the bottom and provide a radical cure, whether agreed to or not. A conduct of this kind will stamp wisdom and dignity on their proceedings, and hold up a light which sooner or later will have its influence." [2] To that he added one day, while standing in the midst of those who were waiting for a quorum: "It is too probable that no plan we propose will be adopted. Perhaps another dreadful conflict is to be sustained. If, to please the people, we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and honest can repair; the event is in the hand of God." [3] Under such inspiration the Virginia delegation, completed by the arrival of George Mason, prepared during the interval to take the lead by conferring "together by themselves two or three hours every day in order to form a proper correspondence of sentiments." [4] On Friday the 25th, the following deputies appeared: From Massachusetts,

Convention did not meet for business on May 14.

Washington's inspiring words.

Deputies present on May 25.

[1] *Madison Papers*, ii, 721–723. On the 28th the representation was increased to nine by the arrival of Maryland and Massachusetts.

[2] March 31, 1787. Sparks, ix, 250.

[3] Gouverneur Morris's oration upon the death of Washington, Dec. 31, 1799, 20–21.

[4] George Mason to his son, Philadelphia, May 20, MS. Bancroft, ii, 5.

Rufus King; from New York, Robert Yates and Alexander Hamilton; from New Jersey, David Brearley, William Churchill Houston, and William Paterson; from Pennsylvania, Robert Morris, Thomas Fitzsimons, James Wilson, and Gouverneur Morris; from Delaware, George Read, Richard Bassett, and Jacob Broom; from Virginia, George Washington, Edmund Randolph, John Blair, James Madison, George Mason, George Wythe, and James McClurg; from North Carolina, Alexander Martin, William Richardson Davie, Richard Dobbs Spaight, and Hugh Williamson; from South Carolina, John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, and Pierce Butler; from Georgia, William Few. After the unanimous election of Washington as President, and William Jackson as Secretary, "on reading the credentials of the deputies, it was noticed that those from Delaware were prohibited from changing the Article of the Confederation establishing an equality of votes among the states." [1] The appointment of a committee to prepare standing rules and orders closed the business of the day; while the next was devoted to the adoption of the rules submitted by it, the first of which provided: "A House to do business shall consist of the deputies of not less than seven states; and all questions shall be decided by the greater number of these which shall be fully represented. But a less number than seven may adjourn from day to day." It was distinctly provided that no registry was to be made of the votes of individuals, who were thus secured greater freedom of action.

Committee to prepare standing rules.

The moment its organization was thus completed, the Convention, on May 29, plunged without the slightest preliminary into the great business its dominating members, with Washington at their head, had come to perform — the business of making an entirely new Constitution on the basis of the invention announced to the world by Pelatiah Webster, February 16, 1783. After a notable speech, Governor Randolph presented the fifteen resolutions embodying what is generally known as the Virginia plan, of which Madison was undoubtedly the real author. That statement should, however, be accompanied by Madison's carefully drawn declaration that "as a sketch on paper, the earliest, perhaps, of a Constitu-

Virginia plan presented May 29.

Madison's first sketch on paper.

[1] *Madison Papers*, ii, 723.

tional Government for the Union (organized into the regular departments, with the physical means operating on individuals) to be sanctioned by *the people of the states*, acting in their original and sovereign character, was contained in the letters of James Madison to Thomas Jefferson of the nineteenth of March; to Governor Randolph of the eighth of April; and to General Washington of the sixteenth of April, 1787, for which see their respective dates." As the sketch or plan contained in those letters is the only one Madison ever claimed as his own, justice to him requires that they should be printed in the Appendix as a supplement to or commentary upon the resolutions offered by Randolph, which were, no doubt, drafted by Madison as a formal summary of the larger statement which the letters contain.[1] Randolph's remark that "as the Convention had originated from Virginia, and his colleagues supposed that some proposition was expected from them, they had imposed this task on him," [2] is a substantial repudiation of any claim upon his part of personal authorship. It is perfectly plain that Madison's great modesty, which often expressed itself in blushes,[3] coupled with his comparative youth and lack, at that time, of commanding prestige, made it as natural as it was expedient for him to treat as the product of his delegation resolutions drafted in the main by his own hand. And yet after every possible credit has been given to Madison for the resolutions and letters, considered as a connected whole, how can any critical mind declare with Bancroft that "the Virginia members prepared a finished plan"? [4] As stated heretofore, only Pinckney and Hamilton formulated, before the Convention met, finished schemes of a new type of federal government; the Virginia Resolutions only set forth the basic principles upon which such a new scheme might be constructed; in the words of Judge Nott, they only "brought before the Convention questions for abstract discussion and bases on which to rest principles of government." [5] And yet, general and abstract as the Virginia Resolutions were, they embodied completely the great invention. They outlined a composite state

Randolph's statement.

Only Pinckney and Hamilton drafted finished plans.

[1] These documents are all printed consecutively in Appendix XII.

[2] From the opening of his speech presenting the Virginia Resolutions. *Madison Papers*, ii, 729.

[3] *The Critical Period*, p. 227.

[4] *Hist of Const.*, ii, v.

[5] See above, pp. 33, 34.

acting directly upon the citizen, with the federal head divided into three departments, legislative, executive, and judicial. The Congress, with full taxing power, was to be divided into two chambers instead of one, while the new government as a whole was to be armed with the right to maintain the supremacy of federal law. So soon as the Virginia Resolutions were referred to "a Committee of the Whole House, to consider the state of the American Union," Charles Pinckney presented his plan or system. The event is thus recorded in the minutes of Yates: "Mr. C. Pinckney, a member from South Carolina, then added that he had reduced his ideas of a new government to a *system*, which he then read." [1] According to Madison it was then "ordered, that the said draft [of the Pinckney plan] be referred to the Committee of the Whole to consider the state of the American Union. Adjourned." Thus it appears that before adjournment on the first day upon which the Convention really proceeded to business, Madison and Pinckney submitted, the one in the form of general principles, the other in a far more concrete and systematic form, the entirely new plan of federal government now embodied in the existing Constitution of the United States.

Pinckney's plan or "system" presented May 29.

Copy of lost Pinckney plan furnished in 1818.

The reasons have been stated already for the conclusion that the copy of the lost Pinckney plan, furnished by its author to the Secretary of State in 1818 and published by him in the following year, contains certainly the substance of his original draft.[2] When that copy is placed in juxtaposition with the Virginia Resolutions, the latter, considered as a "finished plan" of government, are poor indeed. In the light of that fact Madison's criticism of the copy furnished by Pinckney must be judged. That criticism opens with the admission that "*the length of the document* laid before the Convention, and other circumstances" prevented the taking of a copy of the Pinckney plan at the time it was offered; and that admission, as to length, is corroborated by Yates, who says that Pinckney "added that he had reduced his ideas of a new government to a *system*, which he then read." Thus the fact is fixed that what Pinckney actually offered was not a mere abstract but a "system" of government certainly worked out in some detail. The

[1] *Madison Papers*, ii, 746. See also p. 735.
[2] See above, p. 33.

gravamen of Madison's criticism is this: "On comparing the paper with the Constitution in its final form, or in some of its stages, and with the propositions and speeches of Mr. Pinckney in the Convention, *it was apparent that considerable error had crept into the paper*, occasioned possibly by the loss of the document laid before the Convention (neither that nor the Resolution offered by Mr. Paterson, being among the preserved papers), and by a consequent resort for a copy to the rough draft, in which erasures and interlineations, following what passed in the Convention, might be confounded, in part at least, with the original text, and, after a lapse of more than thirty years, confounded also in the memory of the author." [1] Madison's assumption, not entirely unreasonable when made, "that considerable error had crept into the paper," has been so successfully refuted by the work recently done by Professor Jameson and Judge Nott,[2] that but little, if any, weight can now be attached to it. In remembering that the essence of the imputation against Pinckney was embodied in the idea that he had pieced out his original draft by borrowing matter from the Constitution as completed, we should not forget that no one then realized what a reservoir he had to draw from in the great document of February 16, 1783, far more voluminous than the Constitution itself. The fact is that Pinckney surpassed both Madison and Hamilton in the faithfulness with which he restated to the Convention the essence of the invention Webster had made. His version was the version *par excellence*, free as it was, on the one hand, from the timid pretense of the Virginia plan that only a revision of the Articles of Confederation was intended, and, on the other, from the extreme centralizing tendencies of Hamilton's plan, for which the country was not prepared. It must, however, be said in justice to Madison, when we gather his real motives from his letters, that he was just as resolute as Washington in the wish "that the Convention may adopt no temporizing expedients, but probe the defects of the Constitution to the bottom." In his letter to Randolph of April 8, 1787, he said, "In truth, my ideas of a reform strike so deeply at the old Confederation, and lead to such a systematic change, that they scarcely admit of the expedient. . . . Let the National Government be armed with a

Gravamen of Madison's criticism.

Jameson and Nott's refutation.

Pinckney's the version *par excellence*.

Madison's ideas of reform.

[1] *Madison Papers*, iii, Appendix no. 2.

[2] See above, p. 34.

positive and complete authority in all cases where uniform measures are necessary, as in trade, etc." The difficulty was that Washington and Madison had behind them at home vigilant and implacable political enemies who were eager to destroy their work, however worthy it might be. Patrick Henry, Thomas Nelson, and Richard Henry Lee had refused even to be delegates to the Convention; and, at the close, even a man like George Mason was ready to say: "As the Constitution now stands, he could neither give it his support nor vote in Virginia; and he could not sign here what he could not support there." [1]

Provincial spirit in Virginia.

To the narrowness, the selfishness, the short-sightedness of the provincial spirit as embodied in such men, Madison, whose patriotism was ever working through diplomacy, yielded matters of form while clinging to the substance. He was willing to have it appear that they were only reforming the Articles of Confederation if, under that veil, they could make an entirely new Constitution.

The great invention not gradually evolved in Convention.

The fact that during the first hours of the first day upon which the Convention did any real work the entirely new plan of federal government now embodied in the existing Constitution was submitted in different forms in two documents that occupy sixteen printed pages of the "Madison Papers" should convince every one that the theory that the great invention was gradually evolved as the proceedings went on is the most foundationless of all chimeras. May 29 was devoted exclusively to the reception of the two plans drafted by Madison and Pinckney, in which not only every new basic principle that enters into the existing Constitution was carefully defined, but also the greater part of the details as they were finally worked out by the Committee of Detail to which the Pinckney plan was referred on July 26. Despite the long-standing popular misconception to the contrary, no deliberative body ever had its work so cut out and arranged beforehand as the Federal Convention of 1787. It may be said without the slightest exaggeration that the creative work that has made it immortal was finished before it ever met. From May 29 to the close, the single question before the secret conclave was as to the form in which the great invention of February 16, 1783, should be adapted to then existing conditions as a working system of

Its work "cut and dried" beforehand.

[1] *Madison Papers*, iii, 1594.

government. The Committee of the Whole, to which both the Pinckney plan and the Virginia Resolutions had been referred, opened the battle on May 30, with the election of Gorham as chairman, and continued it until June 13, when it rose and reported to the House the results of its deliberations in the form of nineteen resolutions. It is certainly notable that as a prelude to the debate, the basic suggestion Webster had been the first to make was adopted in this form: "that a national government ought to be established, consisting of a supreme legislative, executive, and judiciary." Pierce Butler, recognizing the wisdom of applying to a federal system such a division first popularized by Montesquieu in connection with single states, said "that he had opposed the grant of powers to Congress heretofore, because the whole power was vested in one body. The proposed distribution of the powers with different bodies changed the case, and would induce him to go great lengths." Gouverneur Morris "explained the distinction between a *federal* and a *national, supreme* government; the former being a mere compact resting on the good faith of the parties; the latter having a complete and *compulsive* operation. He contended that in all communities there must be one supreme power and one only." Roger Sherman, who took his seat on that day, while admitting that larger faculties must be bestowed on the new creation, was not willing to do more at that time than vest in it the power to raise its own revenue.[1]

Discussion in Committee of the Whole began May 30.

Division of the federal head.

Webster's basic contention as to the division into two houses of a federal legislature was accepted on May 31, in this form: "That the national legislature ought to consist of two branches,"—a conclusion "agreed to without debate, or dissent, except that of Pennsylvania, given probably from complaisance to Dr. Franklin, who was understood to be partial to a single house of legislation."[2] Beyond that point Webster had not gone; upon the menacing and difficult questions involved in the organization of the two houses he had shed no light; the honor of solving them belongs to the Convention alone. That Pandora's box, involving, as it did, not only the question of slavery but the jealousy and distrust existing between the smaller and larger states, had been opened on May 30, by Hamilton, who moved "that the rights of suffrage in the

Division of Congress into two houses.

[1] *Madison Papers*, ii, 746–747.

[2] *Madison Papers*, ii, 753.

national legislature ought to be proportioned to the number of free inhabitants." In order to cut off irritating debate the motion was postponed; and Madison moved in more general terms "that the equality of suffrage established by the Articles of Confederation ought not to prevail in the national legislature; and that an equitable ratio of representation ought to be substituted." On the next day, after a failure to reach any definite result as to that part of the plan, "the cases in which the national legislature ought to legislate, was next taken into discussion. On the question whether each branch should originate laws, there was an unanimous affirmative, without debate. On the question for transferring all the legislative powers of the existing Congress to this assembly, there was also an unanimous affirmative, without debate." Almost unanimous approval was also given to "the proposition for giving legislative power in all cases to which the state legislatures were individually incompetent." Then it was that Madison said "that he had brought with him into the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national legislature; but also had brought doubts concerning its practicability. His wishes remained unaltered; but his doubts had become stronger." [1] "The last clause of the Sixth Resolution, authorizing an exertion of the force of the whole against a delinquent state" came next into consideration. "The use of force against a state," said Madison, "would look more like a declaration of war than an infliction of punishment; and would probably be considered by the party attacked a dissolution of all previous compacts by which it might be bound." [2]

Suffrage and representation.

Scope of legislative power.

Use of force against a state.

Organization of the executive power.

With the field thus cleared, the Convention proceeded on June 1 to consider the organization of the executive power. Webster's proposal was that "the supreme executive authority" should be vested in a Council of State, "one of which to be appointed President by Congress." The Pinckney plan provided that "the executive power of the United States shall be vested in a President of the United States of America, which shall be his style, and his title shall be His Excellency. He shall be elected for years; and shall be reëligible." The Virginia plan — avoiding the question whether the national

[1] *Madison Papers*, ii, 750, 751, 759, 760. [2] Ibid. 761.

Executive should be one or many — provided "that a national Executive shall be instituted; to be chosen by the national legislature, for the term of ; to receive punctually, at stated times, a fixed compensation for services rendered, in which no increase nor diminution shall be made, so as to affect the magistracy existing at the time of increase or diminution; and to be ineligible a second time." In supporting his proposal Pinckney said he "was for a vigorous executive, but was afraid the executive powers of the existing Congress might extend to peace and war, etc.; which would render the Executive a monarchy of the worst kind, to wit, an elective one." [1] Mr. Wilson moved that the Executive consist of a single person. Mr. C. Pinckney seconded the motion, so as to read "that a national Executive, to consist of a single person, be instituted." Rutledge then supported Pinckney and Wilson, saying "he was for vesting the executive power in a single person, though he was not for giving him the power of war or peace. A single man would feel the greatest responsibility and administer the public affairs best." Gerry, supporting the Webster idea, said he "favored the policy of annexing a council to the Executive, in order to give weight and inspire confidence." Mr. Randolph "strenuously opposed an unity in the executive magistracy. He regarded it as the fœtus of monarchy." To that Wilson retorted "that unity in the Executive, instead of being the fœtus of monarchy, would be the best safeguard against tyranny. He repeated, that he was not governed by the British model, which was inapplicable to the situation of this country; the extent of which was so great, and the manners so republican, that nothing but a great confederated republic would do for it." At that point, in the hope of spreading oil on the waters, Madison induced the Convention, before finally choosing between a single or plural executive, to determine that it should be clothed "with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for." Returning then to the original question, Wilson said, "Chimerical as it may appear in theory, I am for an election by the people. Experience in New York and Massachusetts shows that an election of the first magistrate by the people at large is both a convenient and a successful mode." Sher-

To consist of a single person.

Powers of the Executive.

[1] *Madison Papers*, ii, 762; Elliot, 140.

man replied: "I am for its appointment by the national legislature, and for making it absolutely dependent on that body whose will it is to execute. An independence of the Executive of the supreme legislature is the very essence of tyranny." After debate as to the length of the term, it was settled by a close vote that the Executive should hold for a term of seven years, and should not be twice eligible.[1] But the problem of problems still remained unsolved. How should the Executive be chosen? The far-sighted Wilson who had suggested an election by the people — "chimerical as it may appear in theory" — then proposed borrowing from the constitution of Maryland that electors chosen in districts of the several states should meet and elect the Executive by ballot, but not from their own body. As the time was not yet ripe for the development of that idea, the Convention determined for the moment to vest the choice of the Executive in the national legislature. After a motion by Dickinson for making the Executive removable by the national legislature at the request of the majority of the state legislatures had been decisively defeated, it was agreed that he should "be removable on impeachment and conviction of malpractice or neglect of duty." When a proposal was made to surround the Executive with a council of revision, composed of the Executive and a certain number of the judiciary, "Mr. Gerry doubts whether the judiciary ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality." Upon his motion, after the example of his own state, the veto power was confided to the Executive alone, subject to be overruled by two thirds of each branch.[2]

To be chosen by electors.

The veto power.

Organization of judiciary.

Considering that the Convention was composed chiefly of lawyers, it is remarkable how little conflict took place over the organization of the federal judiciary. We have seen heretofore that Webster not only clearly defined the jurisdiction of the Supreme Court, original and appellate, but also outlined the itinerant judicature, with "judges of law and chancery."

The Virginia plan proposed "that a national judiciary be established; to consist of one or more supreme tribunals, and

[1] *Madison Papers*, ii, 762–767; Elliot, 143.

[2] *Madison Papers*, ii, 768–783; Elliot, 149–150.

of inferior tribunals, to be chosen by the national legislature; to hold their offices during good behavior, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution."

The Pinckney plan proposed that "the judges of the courts shall hold their offices during good behavior; and receive a compensation, which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court; whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, or other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction"; — with the line clearly drawn between such jurisdiction as was to be original and such as was to be appellate.

In the light of these suggestions the Convention resolved on June 4, "that a national judiciary be established, to consist of one supreme tribunal, and of one or more inferior tribunals." On the next day when a jealous opposition to the transfer of business from state to federal courts developed, a motion to dispense with the inferior federal tribunals prevailed, — despite Madison's contention "that unless inferior tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to a most oppressive degree. . . . A Government without a proper executive and judiciary, would be the mere trunk of a body, without arms or legs to act or move." Wilson and Madison then plucked victory from defeat by having the motion to strike out "inferior tribunals" modified by the provision "that the national legislature be empowered to institute inferior tribunals."

One supreme with inferior tribunals.

Thus the distinction was drawn between their actual establishment and the right to establish them in the future. All agreed that the judges should hold office during good behavior and that their compensation should be safe from diminution during the period of service. There was, however, a sharp difference of opinion as to the method of their selection. No favor was given to the Virginia plan of intrusting their appointment to the legislature. When that came up for discussion, Wilson

Tenure and selection of judges.

proposed to vest it in the Executive, and Madison in the Senate. For the moment no action was taken.[1]

Organization of the legislature.

On June 6, Charles Pinckney reopened the question of questions by moving "that the first branch of the national legislature be elected by the state legislatures, and not by the people." Sherman said: "If it were in view to abolish the state governments, the elections ought to be by the people. If the state governments are to be continued, it is necessary, in order to preserve harmony between the national and state governments, that the elections to the former should be made by the latter." Dickinson "considered it essential, that one branch of the legislature should be drawn immediately from the people; and expedient, that the other should be chosen by the legislatures of the states. This combination of the state governments with the national government was as politic as it was unavoidable." On the next day he moved "that the members of the second branch [now called the Senate] ought to be chosen by the individual legislatures," — an implication that each of the smaller states should elect at least one Senator. Against that claim of equality in one branch of the national legislature protests came in many and emphatic forms from the larger states. Wilson said "he wished the Senate to be elected by the people, as well as the other branch; the people might be divided into proper districts for the purpose; and he moved to postpone the motion of Mr. Dickinson, in order to take up one of that import." Madison said that "if the motion [of Mr. Dickinson] should be agreed to, we must depart from the doctrine of proportional representation, or admit into the Senate a very large number of members. The first is inadmissible, being evidently unjust. The second is inexpedient." Cotesworth Pinckney said "if each of the small states should be allowed one senator, there will be eighty at least." After Mason had closed the debate with the declaration that "the state legislatures ought to have some means of defending themselves against encroachments of the national government," the vote was taken; and with one voice, the selection of the second

Combination of state and national governments.

[1] *Madison Papers*, ii, 791–855; Elliot, 155, 156, 188. It was agreed "that the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony."

branch or Senate was given to the state legislatures.[1] In that way the states, as such, were recognized. But on the 9th, the equality of the smaller states was again challenged when the committee resumed consideration of the clause relating to the rule of suffrage in the national legislature. Brearley, Chief Justice of New Jersey, said that: "When the proposition for destroying the equality of votes came forward, he was astonished, he was alarmed. Is it fair, then, it will be asked, that Georgia should have an equal vote with Virginia? He would not say it was. What remedy then? One only, that a map of the United States be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into thirteen equal parts." When, after that angry outburst, the Convention reassembled on Monday, the 11th, Franklin, the peacemaker, read a carefully prepared paper intended to soften the conflict between four Southern and two Northern States, demanding representation in some degree proportioned to numbers, and two Northern and one Southern State, demanding equal representation, — Connecticut standing as a mediator between them. When the test came on the motion "that the right of suffrage in the first branch of the national legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation," it passed by a vote of seven states to three, Maryland being divided.[2] That equitable ratio was found at last in the precedent set in April, 1783, when Congress had apportioned the supplies of the states for the common treasury to the whole number of their free inhabitants and three fifths of other persons. At that juncture Sherman moved "that a question be taken, whether each state shall have one vote in the second branch. Everything, he said, depended on this. The smaller states would never agree to the plan on any other principle than an equality of suffrage in this branch." It was only possible, however, to bring five states

States, as such, recognized.

Suffrage in the popular branch.

Larger states prevail.

[1] "Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, — aye, 10." See *Madison Papers*, ii, 800–821; Elliot, 170.

[2] "It was then moved by Mr. Rutledge, seconded by Mr. Butler, to add to the words, 'equitable ratio of representation,' at the end of the motion just agreed to, the words 'according to the quotas of contribution.'" *Madison Papers*, ii, 842.

against the six demanding proportional representation. When another test of strength resulted in a vote of six states against five, the outcome was a settlement that apportioned the Senators among the states according to representative population, each state being conceded at least one vote. After guaranteeing to each state a republican form of government, after refusing to guarantee to any state its territory, after holding that the new Constitution should be subject to "amendment whensoever it should seem necessary," after requiring oaths from the members of state governments to observe the national Constitution and laws, — the Convention brought the proceedings of that eventful day to a close.[1] On the 12th it was determined that "the new system" should be referred "to the people of the United States for ratification"; that the members of the popular branch should be chosen for three years, and not annually as proposed by Sherman and Ellsworth;[2] that the senatorial qualification of age should be fixed at thirty years, and that Senators should be permitted to serve seven years. On the 13th, after striking out the clause relating to the jurisdiction of the national tribunals in such a way as to leave full room for their organization, and after extending that jurisdiction in certain important particulars, the Committee rose and reported to the House its conclusions in the form of nineteen resolutions that embodied completely the entirely new plan of federal government — called by the Convention "*the new system*" — announced to the world by Pelatiah Webster, as his invention, February 16, 1783. Nothing demonstrates so conclusively the thoroughness of the conversion wrought by Webster's publication as the fact that during the narrow limits of the thirteen sessions that intervened between May 29 and June 13, his invention was accepted as a whole with really no opposition, so far as its vitals were concerned. Such opposition as was made proceeded from the smaller states, earnestly and justly insisting upon an equality of representation in at least one branch of the national legislature, a purely political and not organic question with which Webster, in his wisdom, had not attempted to deal. Only the four years of education that preceded the Convention made possible so prompt an acceptance

Senators to be apportioned according to population.

New plan of federal government reported June 13

[1] *Madison Papers*, ii, 846; Elliot, 181.

[2] Gerry said: "The people of New England will never give up the point of annual elections."

of the "wholly novel theory," in the form in which Madison and Pinckney had restated it. And here let the fact be again emphasized that of the two restatements that presented by Pinckney was by far the most complete, — it was not a mere tableau of general principles, it was a "system" of government. It is therefore reasonable to presume that the more frequent references in the debates to the Virginia plan, as such, was rather the result of a commendable spirit of deference to the prestige of that great commonwealth than a tribute to the superiority of the plan itself. However that may be, the Nineteenth Resolution, presented on June 13, triumphantly vindicates the assertion that, after discussions occupying only thirteen sessions, the great invention of February 16, 1783, was transformed into "the new system" of federal government now embodied in the existing Constitution of the United States.

in the form in which Madison and Pinckney had restated it.

The report presented by Mr. Gorham was in these words: "1. Resolved, that it is the opinion of this Committee, that a national government ought to be established, consisting of a supreme legislature, executive, and judiciary. 2. Resolved, that the national legislature ought to consist of two branches. 3. Resolved, that the members of the first branch of the national legislature ought to be elected by the people of the several states for the term of three years, to receive fixed stipends by which they may be compensated for the devotion of their time to the public service, to be paid out of the national treasury; to be ineligible to any office established by a particular state, or under the authority of the United States, (except those peculiarly belonging to the functions of the first branch,) during the term of service, and under the national government for the space of one year after its expiration. 4. Resolved, that the members of the second branch of the national legislature ought to be chosen by the individual legislatures; to be of the age of thirty years at least; to hold their offices for a term sufficient to insure their independence, namely, seven years; to receive fixed stipends by which they may be compensated for the devotion of their time to the public service, to be paid out of the national treasury; to be ineligible to any office established by a particular state, or under the authority of the United States, (except those peculiarly belonging to the functions of the second branch,) during the term of service, and under the

Text of resolutions.

national government for the space of one year after its expiration. 5. Resolved, that each branch ought to possess the right of originating acts. 6. Resolved, that the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaties subsisting under the authority of the Union. 7. Resolved, that the rights of suffrage in the first branch of the national legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation, namely, in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons, not comprehended in the foregoing description, except Indians not paying taxes in each state. 8. Resolved, that the rights of suffrage in the second branch of the national legislature ought to be according to the rule established for the first. 9. Resolved, that a national executive be instituted, to consist of a single person; to be chosen by the national legislature, for the term of seven years; with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for; to be ineligible a second time; and to be removable on impeachment and conviction of malpractices and neglect of duty; to receive a fixed stipend by which he may be compensated for the devotion of his time to the public service, to be paid out of the national treasury. 10. Resolved, that the national executive shall have the right to negative any legislative act which shall not be afterwards passed by two thirds of each branch of the national legislature. 11. Resolved, that a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature, to hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually

in office at the time of such increase or diminution. 12. Resolved, that the national legislature be empowered to appoint inferior tribunals. 13. Resolved, that the jurisdiction of the national judiciary shall extend to all cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony. 14. Resolved, that provision ought to be made for the admission of states lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole. 15. Resolved, that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day, after the reform of the Articles of Union shall be adopted, and for the completion of their engagements. 16. Resolved, that a republican constitution, and its existing laws, ought to be guaranteed to each state, by the United States. 17. Resolved, that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary. 18. Resolved, that the legislative, executive, and judiciary powers within the several states ought to be bound by oath to support the Articles of Union. 19. Resolved, that the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times after the approbation of Congress, to be submitted to an assembly or assemblies recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon."[1]

"The scheme is itself totally novel," declared Lansing.

The triumph of those who created an entirely new type of federal government through the nineteen resolutions of June 13 was complete. The nature of the revolution they had wrought was tersely described by Lansing, who said: "The scheme is itself totally novel. There is no parallel to it to be found." [2] But there is no reason to believe that that fact would have militated against the result, in the absence of the bitterness engendered by the unjust and intolerant action of the larger states in depriving the smaller of equality of representation in both branches of the national legislature. "Previous to the arrival of the majority of the states, the rule by which

[1] *Madison Papers*, ii, 858–861; Elliot, 185.
[2] *Madison Papers*, ii, 869.

they ought to vote in the Convention had been made the subject of conversation among the members present. It was pressed by Gouverneur Morris and favored by Robert Morris and others from Pennsylvania, that the large states should unite in firmly refusing to the small states an equal vote, as unreasonable, and as enabling the small states to negative every good system of government, which must, in the nature of things, be founded on a violation of that equality." At that juncture Virginia, greatly to her honor, "discountenanced and stifled the project." [1] But unfortunately Virginia, as the leader of the larger or national states, changed her attitude, and became the champion of an injustice that came very near wrecking all that had been done. As Madison warmly supported his state in that course, Dickinson said to him, "You see the consequence of pushing things too far. Some of the members from the smaller states wish for two branches in the General Legislature and are friends to a good National Government; but we would sooner submit to foreign power, than submit to be deprived, in both branches of the legislature, of an equality of suffrage, and thereby be thrown under the domination of the larger states." Those who rebelled against that injustice formed a coalition concerted among the members from New Jersey, New York, Connecticut, and Delaware, including perhaps Luther Martin of Maryland, who, as Madison tells us, "made with them a common cause, though on different principles. Connecticut and New York were against a departure from the principle of the Confederation, wishing rather to add a few more new powers to Congress than to substitute a national government. The states of New Jersey and Delaware were opposed to a national government, because its patrons considered a proportional representation of the states as the basis of it. The eagerness displayed by the members opposed to a national government, from these different motives, began now to produce serious anxiety for the result of the Convention." [2] As a counterblast to the result reached on June 13, the coalition, speaking through Paterson of New Jersey, asked on the next day "that further time might be allowed them to contemplate the plan reported from the Com-

Injustice to the smaller states.

They form a coalition.

New Jersey plan their counterblast.

[1] *Madison Papers*, ii, 726, note.
[2] Ibid., ii, 862–863, note.

mittee of the Whole, and to digest one purely federal, and contradistinguished from the reported plan." On the 15th Paterson presented the well-known New Jersey plan, which he offered as a substitute for the new creation, and, in order to give it "a fair deliberation, it was agreed, that it should be referred to a Committee of the Whole; and that, in order to place the two plans in due comparison, the other should be recommitted." As the New Jersey plan simply proposed a revision of the Articles of Confederation, the Convention was at last brought face to face with a choice between a "confederated state" of the old type and a "composite state" of the new type. The briefness and feebleness of the struggle made by Paterson and his allies proves how completely the old idea had passed away. Despite the fact that the leader of the fallen cause spoke with the skill of a veteran in advocating "not his own opinions," but "the views of those who sent him," it was all in vain. The spectre of the Confederation, with its empty skull, its empty pocket, and its boneless arms, stood forth in its impotence to refute all he had to say. After the mighty Wilson had trampled upon his argument, Pinckney touched the heart of the matter when he said, "The whole comes to this, as he conceived. Give New Jersey an equal vote, and she will dismiss her scruples, and concur in the national system." The general debate as to the relative merits of the two systems that began on the 16th ended on the 18th, when the postponement of the consideration of Paterson's resolution was agreed to by ten states.

How it was trampled upon.

Upon the heels of the advocate who thus struggled in vain to uphold the primitive conception of the sovereignty of the states came the extreme exponent of the opposing school, who said that he "had been hitherto silent on the business before the Convention, partly from respect to others whose superior abilities, age, and experience rendered him unwilling to bring forward ideas dissimilar to theirs; and partly from his delicate situation with respect to his own state, to whose sentiments, as expressed by his colleagues, he could by no means accede." From the Scottish clan which has given one of the most profound metaphysicians and one of the most creative mathematicians to the modern world came that brilliant offshoot who was born in the Island of Nevis, in the West Indies, January 11,

The Hamilton plan.

Race-traits of the soldier-statesman.

1757. To the faculty for abstract reasoning, to the shrewdness and persistence in administration which Alexander Hamilton, one of the most precocious young men of his time, drew from his Scottish ancestry, was united the magnetic charm, the vivacity, the rare personal beauty derived from a French mother of Huguenot descent. In 1772, spurning "the grovelling ambition of a clerk," and resolved "to prepare the way for futurity," he sailed from the tropics to Boston; in 1773 he entered Kings (Columbia) College at New York; in 1774 he was aiding the patriot cause with tongue and pen; in 1776 he was made a captain of artillery; and after notable service at White Plains, Trenton, and Princeton, he became in March, 1777, aide-de-camp, secretary, and confidant to Washington. The mind of the young soldier-statesman — who was armed with a moral dignity and earnestness characteristic alike of Puritan and Huguenot, with an inborn genius for organization, and with special aptitude for economics and finance — went like an arrow to the heart of the problem with which the financiers of the Revolution were struggling in vain. He was one of the very first to entertain the thought, even if he did not express it publicly,[1] that a Federal Convention should be called for the purpose of making an entirely new Constitution. And, as stated heretofore, we find him in 1780 supporting the efforts of Pelatiah Webster, thirty-one years his senior, who was then urging the appointment of a financier, that is, of a competent single officer to take charge of the finances in place of the committees or boards who had hitherto been intrusted with them.[2] When on February 16, 1783, Webster gave to the world the entirely new plan of government the Federal Convention was destined to adopt, Hamilton, feeling the impact of the blow, promptly notified Congress, for the first time, of his purpose to submit to it a plan for the calling of a general convention, whose "object would be to strengthen the Federal Constitution." Finally, when, largely through his efforts, the trade convention that met at Annapolis in 1786 reassembled at Philadelphia as the Federal Convention of 1787, Hamilton came as a deputy from New York with the great invention of February 16, 1783,

Special aptitude for economics and finance.

Followed Webster's initiative.

[1] See his private letter to James Duane of September 3, 1780, referred to in Gaillard Hunt's *Life of James Madison*, 108.

[2] See above, p. 161.

restated in the form of a finished constitution. Of the famous oration in which he presented his plan to the Convention we have only a fragment. His son tells us that "the speech of which this brief is given, occupied in the delivery between five and six hours, and was pronounced by a competent judge [Gouverneur Morris] 'the most able and impressive he had ever heard.' In the course of this speech he read his plan of government, not the propositions which are found in the printed journal, but 'a full plan, so prepared that it might have gone into immediate effect if it had been adopted.' This plan consisted of ten articles, each article being divided into sections." [1] Only after Hamilton's finished plan as printed in the Appendix has been studied is it possible to understand how exhaustive his preparation for the Convention really was. Only Hamilton and Pinckney restated the great invention as finished systems of government. While the plan of Hamilton is more voluminous, possibly more labored than that of Pinckney, it was far less practical, far less in accord with the spirit that animated the Convention as a whole. While the Pinckney plan carefully respected Webster's basic contention that the new creation should be a government of limited powers, with the residuum of power retained by the states, the Hamilton plan offended the spirit of state sovereignty by proposing (Art. VIII, Sec. 1) that "the Governor or President of each state shall be appointed under authority of the United States, and shall have a right to negative all laws about to be passed in the state of which he shall be Governor or President, subject to such qualifications and regulations as the legislature of the United States shall prescribe." Hamilton "was praised by everybody, but supported by none." [2] His plan, as such, seems to have made no impression whatever; it passed with the occasion; it was not even referred to the Committee of Detail on July 26, when the Pinckney plan was referred.

His "full plan."

More voluminous than that of Pinckney.

Why it offended.

Thus it appears that on a single day — June 18 — the Convention virtually disposed once and forever of the old dream of a Confederation as embodied in the New Jersey plan and of the new and extreme conception of a highly centralized national system as embodied in the Hamilton plan. The

Only two plans considered.

[1] J. C. Hamilton's *Life of Alexander Hamilton*, ii, 490–491.
[2] Yates in Elliot, i, 431.

Convention really considered but two plans — the Virginia plan and the Pinckney plan — through which the great invention passed, after thirteen sessions, into "the new system" embodied in the nineteen resolutions of June 13. When on the 19th, King moved that the Committee of the Whole rise and report that they do not agree to the propositions of Paterson, it was carried, thus leaving the nineteen resolutions for consideration, *seriatim*, in the Convention as distinguished from the Committee of the Whole. On that day it was that Hamilton said: "I did not intend yesterday a total extinguishment of state governments; but that a national government must have indefinite sovereignty; for if it were limited at all the rivalship of the states would gradually subvert it. The states must retain subordinate jurisdictions."[1] While the states as a whole spurned that suggestion, the smaller ones were still firmly united in the just resolve to preserve their autonomy by securing an equal vote in at least one branch of the national legislature. If the contrary contention had not been persevered in by the larger states, the bitterest of all conflicts would have been avoided, and the time occupied by the proceedings shortened certainly one third. As a preliminary to that conflict came the suggestion of Martin, who said "he considered that the separation from Great Britain placed the thirteen states in a state of nature toward each other." To which Wilson replied that as he read the Declaration of Independence the colonies "were independent, not individually but unitedly, and that they were confederated, as they were independent states." When the motion came from the smaller states that the word "national" should be stricken out of the first resolution, it was surrendered without a struggle, the house then passing to the second, which provided that the legislature should consist of two branches, a matter finally settled by six national states reinforced by Connecticut on June 21. By that time the country seems to have accepted as a finality Webster's suggestion that the new federal legislature should consist of two branches instead of one. The difficulty that remained was in the application of that idea to a federal state in the absence of any precedent in history to guide or suggest the method of it. Difficult as that task certainly would have

Nineteen resolutions considered *seriatim*.

The legislature to consist of two branches.

[1] *Madison Papers*, ii, 905; Elliot, 212.

been under any circumstances, it was complicated here not only by the intense jealousy existing between the smaller and larger states, but also by the existence of African slavery that intruded itself into every basis upon which representation could be apportioned. The larger states strenuously insisted upon representation in both branches of the legislature based entirely upon population, — the smaller were immovable in their demand for equality as states in at least one of them.

Claim of large states stated by Wilson;

On June 25, Wilson in stating the case for the larger states said: "When I consider the amazing extent of country, the immense population which is to fill it, the influence which the government we are to form will have, not only on the present generation of our people and their multiplied posterity, but on the whole globe, I am lost in the magnitude of the object. We are laying the foundations of a building in which millions are interested, and which is to last for ages. In laying one stone amiss, we may injure the superstructure; and what will be the consequence if the corner-stone should be loosely placed? A citizen of America is a citizen of the general government, and is a citizen of the particular state in which he may reside. The general government is meant for them in the first capacity; the state governments in the second. Both governments are derived from the people, both meant for the people; both, therefore, ought to be regulated on the same principles. In forming the general government, we must forget our local habits and attachments, lay aside our state connections, and act for the general good of the whole. The general government is not an assemblage of states, but of individuals, for certain political purposes; it is not meant for the states, but for the individuals composing them; the individuals, therefore, not the states, ought to be represented in it."[1]

that of small states by Ellsworth.

Ellsworth instantly "urged the necessity of maintaining the existence and agency of the states. Without their coöperation it would be impossible to support a republican government over so vast an extent of country. An army could scarcely render it practicable." It was on that day determined by a vote of nine to two "that the members of the second branch be chosen by the individual legislatures." Virginia and Pennsylvania dissented, because they looked upon that method of choice as the stepping-stone to

[1] *Madison Papers*, ii, 956–957; Elliot, 239; Yates in Elliot, i, 445, 446.

an equal representation. Not until the 27th was the irrepressible conflict opened by Rutledge, who moved that the rules of suffrage in the two branches of the national legislature should then be considered. During the fierce contest between the larger and the smaller states that ensued, in which Madison, Wilson, and King championed the cause of the former, while Sherman, Ellsworth, Lansing, Paterson, and Dickinson were equally resolute for the latter, feeling became so intense that on the 28th, as Martin afterwards reported, the Convention was "on the verge of dissolution, scarcely held together by the strength of a hair."[1] So loud was the tempest that Franklin, in the hope of restoring calm, proposed before adjournment that the proceedings should be opened every morning with prayer, and Randolph, in repeating that suggestion, proposed that a sermon be preached at the request of the Convention on the 4th of July.[2] On the next day, after Johnson had contended that "in one branch of the general government the people ought to be represented, in the other the states," after Gorham had declared that it was his duty to "stay here as long as any other state would remain with them, in order to agree on some plan that could with propriety be recommended to the people," after Ellsworth had said, "I do not despair, I still trust that some good plan of government will be devised and adopted," Madison, undaunted, added fresh fuel to the flame by urging that "the states never possessed the essential rights of sovereignty; these were always vested in Congress. Voting as states in Congress is no evidence of sovereignty. The state of Maryland votes by counties. Did this make the counties sovereign? The states, at present, are only great corporations, having the power of making by-laws not contradictory to the general Confederation."[3] At the end of that day the tension was lessened by a decision, never departed from, that the rule of suffrage in the first branch ought to bear proportion to the population of the several states. Then it was that Ellsworth said that he was not sorry that the vote just passed had determined against the old rule in the first branch. "He hoped it would become a ground of compromise with regard to the second branch. We were partly national, partly federal. The

A crisis reached on June 28.

Madison adds fuel to the flame.

The Connecticut compromise.

[1] Elliot, i, 358.
[2] *Madison Papers*, ii, 985–986.
[3] Yates in Elliot, i, 461; *Madison Papers*, ii, 990.

proportional representation in the first branch was conformable to the national principle, and would secure the large states against the small. An equality of voices was conformable to the federal principle, and was necessary to secure the small states against the large. He trusted that on this middle ground a compromise would take place."[1] Wilson's counterblast to that noble attempt to solve the problem was this: "If the minority of the people of America refuse to coalesce with the majority on just and proper principles; if a separation must take place, it could never happen on better grounds. The votes of yesterday against the just principle of representation, were as twenty-two to ninety, of the people of America. Taking the opinions to be the same on this point, and he was sure, if there was any room for change, it could not be on the side of the majority, the question will be, shall less than one fourth of the United States withdraw themselves from the Union, or shall more than three fourths renounce the inherent, indisputable and unalienable rights of men, in favor of the artificial system of states?"[2] Wilson did not then understand that the majority were on the brink of a surrender to the minority. The break in the ranks of the larger states began on June 30, when Davie of North Carolina declared that he preferred the plan of Ellsworth to the rule of proportional representation that would in time render the Senate too numerous a body. "He thought that, in general, there were extremes on both sides. We were partly federal, partly national, in our union; and he did not see why the Government might not in some respects operate on the states, in others, on the people." Then it was that the peacemaker, Franklin, said: "When a broad table is to be made, and the edges of planks do not fit, the artist takes a little from both, and makes a good joint. In like manner, here, both sides must part with some of their demands, in order that they may join in some accommodating proposition." When the Convention reassembled on July 2, Cotesworth Pinckney, in order to execute that idea, "proposed that a committee consisting of a member from each state be appointed to devise and report some compromise."[3] In order to give that com-

Davie of North Carolina supports it.

[1] Yates in Elliot, i, 464; *Madison Papers*, ii, 996–997.

[2] *Madison Papers*, ii, 1000–1001.

[3] "He liked better the motion of Dr. Franklin (q. v. June 30, p. 1009). Some compromise seemed

mittee, elected by ballot, composed of Franklin, Gerry, Ellsworth, Yates, Paterson, Bedford, Martin, Mason, Davie, Rutledge, and Baldwin, time for deliberation, and to all an opportunity to celebrate the anniversary of independence, the Convention adjourned until July 5. When on that day the Grand Committee declared that in the first branch of the First Congress there should be one member for every forty thousand inhabitants, counting all the free and three fifths of the rest; that in the second branch each state should have an equal vote,[1] the anger of the larger states found vent through Gouverneur Morris, who cried out: "State attachments and state importance have been the bane of this country. We can not annihilate but we may perhaps take out the teeth of the serpents."[2] That hope was in vain; with teeth undrawn "the serpents" held on to the fruits of the victory they had won.

Compromise reported on July 5.

On the 7th, that part of the report allowing each state an equal vote in the Senate was retained; on the 10th, the committee of one from each state on the ratio of representation in the popular branch parceled out thirty-five members to the North, and thirty to the South out of the sixty-five assigned to that branch; on the 11th, the First Congress under the new Constitution was required to provide for a census. On that day it was that Randolph agreed to the amendment that proceeded from North Carolina embodying the final concession on the representation of slaves, the permanent basis being the free inhabitants and three fifths of all others.[3] It is hard not to be touched by Bancroft's declaration that when the Convention adjourned on that day "Virginia with a united delegation had her hand on the helm, while North Carolina kept watch at her side."[4]

Concession as to representation of slaves.

Next day Gouverneur Morris proposed that taxation should be proportioned to representation in such a way as to extend it to every branch of the revenue. When the dangers of that proposal were pointed out, the mover limited it to direct

to be necessary, the states being exactly divided on the question for an equality of votes in the second branch." *Madison Papers*, ii, 1017.

[1] In consideration of that concession to the smaller states, it was determined that the first branch should possess the sole power of originating taxes and appropriations.

[2] *Madison Papers*, ii, 1030.

[3] *Madison Papers*, ii, 1066; Elliot, 295. Butler and Cotesworth Pinckney instantly demanded that the blacks should be counted equally with the whites.

[4] *Hist. of Const.*, ii, 82.

taxation, saying that "it would be inapplicable to indirect taxes on exports and imports and consumption." Thereupon the Convention agreed unanimously that "direct taxation ought to be in proportion to representation."[1] Thus was finally fixed the compromise proportioning representation to direct taxation, and both to the number of free inhabitants and three fifths of the rest.[2] And yet despite all that had been accomplished the settlement as fixed by the Grand Committee was not safe, — the death-grapple had yet to come. When the Convention reassembled on Monday the 16th the question was taken on "the whole report, as amended, and including the equality of votes in the second branch." Four of the six states (Virginia, Pennsylvania, South Carolina, and Georgia) which demanded a proportional representation in that branch still stubbornly refused to yield that vital point. Victory was only won by pledging Massachusetts to neutrality (Gerry, Strong, — aye; King, Gorham, — no), and by the bold and determined stand taken by North Carolina in favor of justice to the smaller states. In response to the signal Davie had given on June 30, North Carolina broke away at the critical moment from her great associates and gave a majority of one to the smaller states.[3] When on the 17th Gouverneur Morris attempted to reopen the question, a failure to second his motion was an indication from the larger states that they accepted the decision of the day before as final. The last word was not spoken, however, until the 23d, when the number of Senators from each state was fixed at two, each to have one vote.[4] The new Constitution was now made in fact if not in name; and it was embodied in the twenty-three resolutions into which the original nineteen had grown since the 13th of June. On the 26th those resolutions were referred to "the Committee of Detail, and the Convention then unanimously adjourned till Monday, August 6, that the Committee of Detail might have time to prepare and report the Constitution."[5] That committee was com-

Direct taxation and representation.

North Carolina gives victory to smaller states.

Twenty three resolutions referred to Committee of Detail.

[1] *Madison Papers*, ii, 1081; Elliot, 302.

[2] Even Georgia approved, and South Carolina divided her vote.

[3] Connecticut, New Jersey, Delaware, Maryland, North Carolina, — aye, 5. *Madison Papers*, ii, 1107; Elliot, 316.

[4] *Madison Papers*, ii, 1186; Elliot, 357.

[5] *Madison Papers*, ii, 1220. For the text of the twenty-three resolutions referred to the Committee of Detail, see Appendix xvi.

posed of Wilson, Ellsworth, Gorham, Randolph, and Rutledge, of whom the last was chairman; and to it were referred, along with the resolutions, the Pinckney plan and the New Jersey plan. Hamilton's plan was not referred.[1] On July 10 he had been deserted by Yates and Lansing, dominated as they were by the factious selfishness of Clinton, who had openly declared that no good was to be expected from the deliberations at Philadelphia; that the Confederation might still be found adequate to all the purposes of the Union.[2] Thus left alone, without a vote, Hamilton took but little part in the subsequent proceedings, whose results he was so brilliantly to defend in the pages of "The Federalist."

John Rutledge, chairman.

As the Committee of Detail was armed with such large constructive powers as to permit it to evolve a finished constitution out of such data as it might collect even beyond the twenty-three resolutions and the Pinckney plan, it is not strange that the Virginia jurist, Randolph, and the South Carolina jurist, Rutledge, should have been appointed as special guardians of the contributions made by their respective states. Rutledge, who was nearly twenty years older than Charles Pinckney, was the foremost statesman and jurist of his time south of Virginia. Born at Charleston, of Scotch-Irish ancestry, he was sent, after careful private instruction at home, to study law in the Temple at London. In 1765 he began his national career in the Stamp Act Congress of 1765, and in 1774 he became eminent as a member of the First Continental Congress, Patrick Henry declaring him to be "by far the greatest orator" in that body. In 1776 he was a member of the Board of War, soon taking an active part in the field as captain of artillery. After the war he returned to his home and served in the legislature. He is said to have been so hopeful and resourceful amid the gravest trials that timidity and wavering disappeared before him. Such were the antecedents, such the character and attainments of the Chairman of the Committee of Detail, who certainly must have regarded with respect, probably with special pride and interest, the finished "system" of government contributed by his brilliant and youthful compatriot. There is no reason to believe that Randolph took any

A great orator.

[1] *Madison Papers*, ii, 1197, 1220–1226.
[2] *Penn. Packet*, July 26, 1787.

less interest in the contribution of Madison. Against the two Southern members, Rutledge and Randolph, stood the two Northern members, Wilson and Gorham, while as an arbitrating force between the two stood Ellsworth of Connecticut, who had just contributed so much to the success of the famous compromise that had saved the Convention from dissolution. In the absence of any record or personal narrative of their ten days of deliberation there has been, until very recently, practically nothing to guide us as to the manner in which their delicate and difficult functions were performed. As a matter of course their primary duty was to elaborate the twenty-three resolutions into a constitution; and we know from the result that they actually turned each resolution into an article, many of which were subdivided into sections as receptacles for the added details. From what source did these added details come? Certainly not from the Virginia plan, which contained none. As stated heretofore, the Virginia Resolutions only set forth the basis upon which a constitution might be constructed, — in the words of Judge Nott they only "brought before the Convention questions for abstract discussion and bases on which to rest principles of government." As such they had been exhausted already; the Committee of Detail, able as it was, could not draw from an empty well. The most likely source from which details could be drawn was the Pinckney "system," whose sixteen articles occupy eleven pages of the "Madison Papers." If we have there a substantially true copy of the original — and who will be partisan enough to doubt it now — a mere comparison of it with the report of the Committee of Detail puts beyond all question Pinckney's marked influence in directing the Committee's work. We have every reason to believe that all questions that came before it were probed to the bottom; that the state constitutions were looked to as the best sources for approved expressions and long-tried formulas. As an illustration of the manner in which Randolph worked, special value should be attached to the reprint in facsimile recently made by a well-known specialist of a tentative draft of a constitution mainly in the handwriting of Randolph with parts written in by Rutledge, who revised it no doubt at the time. The internal evidence justifies every conclusion in which Mr. Meigs has indulged in regard to the character of this

Ellsworth as arbitrator.

Importance of Pinckney's "system."

Randolph's tentative draft.

paper, and also as to the probable time of its production. No possible difficulty should arise "from the fact that the draft covers a good many points which are not included in the resolutions referred, but a very little consideration will show that this is only what ought to be expected. The resolutions were by no means supposed to include the whole of the proposed Constitution, and the Committee of Detail was appointed for the very purpose of sketching the instrument at length, and filling in the details which were required by the general outline of the government contained in the resolutions." [1] While gathering such details, largely no doubt from the Pinckney "system," Rutledge and Randolph naturally worked together, and the paper in question is certainly one of the charts by which they were guided. But more conclusive still are the evidences of the importance of the Pinckney plan to the work of the Committee very recently drawn from two papers found among the Wilson manuscripts in the Library of the Historical Society of Pennsylvania to which brief reference has been made already.[2]

Professor Jameson's discovery.

The first paper, which is in Wilson's handwriting, was discovered by Professor Jameson and published by him in the "Annual Report of the Historical Association, 1902" (vol. I, p. 151). That paper, containing the preamble of the Pinckney draft, and consequently of the draft of the Committee, is followed by the first three articles of the Committee's draft, with some slight variations of language; and then, under the caption of what should be Article IV, come twenty-nine paragraphs containing provisions closely agreeing with provisions in the Committee's draft, but incoherent in their order. The second sheet is missing, and the third contains various provisions following closely the Seventeenth, Eighteenth, Nineteenth, Twentieth, and Twenty-first Resolutions. Near the close is the provision relating to the veto power taken from the Constitution of Massachusetts.

Final draft by Wilson.

The second paper, likewise discovered by Professor Jameson, embodies a final draft by Wilson, evidently prepared for the consideration of other members of the Committee, as the first seems to have been prepared for his personal use. It is written on large foolscap in what is called double columns, — half of each page being left blank for the comments and sug-

[1] Meigs, *The Growth of the Constitution*, 321. See also preface.

[2] See above, p. 35.

gestions of others. This final draft in the clear, legible, almost feminine hand of Wilson, with scarcely a clerical error before the work of revision began, is scarred and slashed by forty-three amendments scrawled upon it in the bold, slovenly, and illegible writing of Rutledge. This final draft, unlike the first, is divided into articles, but unlike the Committee's, is not subdivided into sections. Thus it appears that Rutledge gave probably more attention to the Wilson than to the Randolph draft, as he wrote many more amendments on its margin. There is nothing whatever to show that either Ellsworth or Gorham, who were not constructive in the Convention, ever attempted to draft a constitution; everything in the Committee's report is traceable to Pinckney, Rutledge, Wilson, and Randolph; they were its authors. Judge Nott says with convincing force that "there are three important articles in Wilson's draught which are not Wilson's. These appear on the margin in the handwriting of Rutledge and answer to Articles XIV, XV, and XVI of the Committee's draught. As they are in almost the precise language of Pinckney's Articles XII and XIII, the much-repeated question again arises, did Rutledge take them from the Pinckney draught; were they then in the Pinckney draught to be taken; or did Pinckney abstract them from the Committee's draught? The question is easily and decisively answered: *these articles are described in the 'Observations'; Pinckney's title to them cannot be questioned; Wilson and Rutledge had his draught before them, and used it, when Rutledge wrote those articles upon the margin.*" [1] Pinckney's triumphant vindication by means of documents so imperfect, so circumstantial in many particulars, should admonish all special students of the subject that it is useless to fight longer against the overshadowing facts as to the authorship of "the new system" as a whole embodied in the document of February 16, 1783, — one of whose greatest marvels is its completeness.

Judge Nott's comments.

What Pinckney's vindication teaches.

When on August 6, "Mr. Rutledge delivered in the report of the Committee of Detail," each member of the Convention received a copy of its draft of a constitution, printed on broadsides in large type, with wide margins and spaces for minutes or amendments. On the 7th, the work of revision began in earnest, and from that time until September 10 the Conven-

Report of Committee of Detail, August 6.

[1] *The Mystery of the Pinckney Draught*, p. 182.

tion subjected the draft to a minute examination, clause by clause. During that time, as the members grew weary of the work, more and more subjects were referred to special committees, until finally the postponed and unfinished parts of the Constitution were referred to a committee constituted for that purpose. From these committees came many important provisions, notably from the committee last named those relating to the method of electing a President.[1] How to regulate the choice of a republican chief magistrate was a difficult problem, as neither the Greek nor Low-Dutch leagues had had a separate executive branch, and as the elective monarchies of the Papal States, of Poland, and of Germany furnished no helpful precedents. The Committee of Detail simply reported that "the executive power of the United States shall be vested in a single person. His style shall be 'The President of the United States of America,' and his title shall be, 'His Excellency.' He shall be elected by ballot by the legislature,"[2] — a substantial reproduction of Webster's suggestion that "the supreme executive authority" should be vested in a Council of State, "one of which to be appointed President by Congress." The Virginia plan simply provided in the same way that the President should "be chosen by the national legislature for the term of "; and the Pinckney plan that "he shall be elected for years; and shall be reëligible." Not until near the close of the Convention was the method of his election determined. As early as July 26, after Mason had restated the seven plans proposed of electing the chief magistrate, the plan he considered best was accepted; it was then agreed that a single person should be chosen by the national legislature for the term of seven years; and that he should be ineligible a second time.[3] Two days before, Gouverneur Morris declared: "Of all possible modes of appointing the Executive, an election by the people is best; and election by the legislature is worst." When on August 24 that part of the report of the Committee

Special committees.

Choice of an executive.

A single person to be chosen.

[1] On September 4, the *Committee on Unfinished Portions*, of which Gouverneur Morris was a member, made a report working an entire change in the method of electing a President as previously outlined. See *Madison Papers*, iii, 1486 *sq.*

[2] It also provided that "he shall hold his office during the term of seven years; but shall not be elected a second time."

[3] *Madison Papers*, ii, 1207; Elliot, 368.

of Detail relating to the Executive came before the Convention, he revived the plan of choosing the President by electors, and it received the support of five states including his own.[1] Opinion in favor of that plan then ripened so fast that on August 31, the mode of choosing the President, his powers, and the question of his reëligibility were referred to the Grand Committee elected on that day for the consideration of postponed and unfinished business.[2] On September 4, after full consideration, the report was in favor of a term of four years; the election was vested in electors to be appointed in each state as its legislature might direct; and such electors were to be equal to the whole number of its Senators and Representatives in Congress.[3] Thus the electoral colleges collectively were to be the exact counterpart of the joint convention of the national legislature. In the same report it was provided that "in every case, after the choice of the President, the person having the greatest number of votes shall be Vice-President; but if there shall remain two or more who have equal votes, the Senate shall choose from them the Vice-President." In order to make an excuse for his existence the Convention provided that he should be President of the Senate, despite Mason's objection that "that is an encroachment on the Senate's rights; and, moreover, it mixes up too much the legislative and the executive."[4] In order to master the details of the remainder of the gravely important and highly interesting work done between August 7 and September 10, the student must plough his way, page by page, through the record itself, that ends on the day last named with Randolph's despairing question: "Was he to promote the establishment of a plan, which he verily believed would end in tyranny?"[5]

Electoral colleges defined.

Vice-President to be President of Senate.

On September 8, a committee was appointed "to revise the style of and arrange the articles which had been agreed to by the House." That committee, chosen by ballot, consisted of Johnson, Hamilton, Gouverneur Morris, Madison, and King.[6] On the 12th, Johnson "reported a digest of the plan, of

Committee on Style reported September 12.

[1] *Madison Papers*, iii, 1421.

[2] The eleven, elected by ballot, were Gilman, King, Sherman, Brearley, Gouverneur Morris, Dickinson, Carroll, Madison, Williamson, Butler, and Baldwin. *Madison Papers*, iii, 1478.

[3] Ibid. 1485–1488; Elliot, 507.

[4] Ibid. 1517.

[5] Ibid. 1541.

[6] Ibid. 1532.

which printed copies were ordered to be furnished to the members. He also reported a letter to accompany the plan to Congress." [1] Whatever opportunity for improvement remained, after the critical review the Convention had made of every clause of every section, was most skillfully utilized by Gouverneur Morris,[2] who undoubtedly cast the Constitution in its final form not only by rearranging its parts, but also by removing as far as possible all redundant and equivocal expressions. While the report of the Committee on Style was pending, quite a number of minor amendments were made, — not until the 15th was the Constitution ordered to be engrossed.[3]

The last day, September 17. Franklin's appeal.

On the very last day, Monday the 17th, after the engrossed instrument had been read, Franklin, in the hope of winning over the three dissidents, said: "Mr. President, I confess that there are several parts of this Constitution of which I do not at present approve, but I am not sure I shall never approve them. It astonishes me to find this system approaching so near to perfection as it does. On the whole, sir, I cannot help expressing a wish that every member of the Convention, who may still have objections to it, would with me on this account doubt a little of his own infallibility, and, to manifest our unanimity, put his name to this instrument." In moving that it be signed by the members, he made a final and ineffectual effort to win over the obdurate Randolph, Mason, and Gerry, by offering the simple testimonial that the Constitution had received "the unanimous consent of the states present." Before the question was put, a proposal was made by Gorham, upon an intimation from Washington, to render the House of Representatives a more popular body by allowing one member for every thirty thousand inhabitants. Washington deemed this matter so important that, for the first time, he addressed the Convention and urged the passage of the amendment. In putting the question he said: "The smallness of the number of Representatives has been considered by many members as insufficient security for the rights and interests of the people; and to myself has always appeared exceptionable; late as is the moment, it will give me much

Washington addresses Convention for first time.

[1] *Madison Papers*, iii, 1543.

[2] See G. Morris to T. Pickering, Dec. 22, 1814, in *Life*, by Sparks, iii, 323.

[3] *Madison Papers*, ii, 1595; Elliot, 553.

satisfaction to see the amendment adopted unanimously." [1] And so it was. Having thus spoken his first and the Convention's last word, Washington — after its journals and papers had been confided to his care, "subject to the order of Congress, if ever formed under the Constitution," and after the delegations had come forward in geographical order and affixed their signatures to it — early in the evening retired "to meditate on the momentous work which had been executed." [2]

Result reported to Congress, September 20.

On the 20th of September, Washington's letter as President of the Convention, together with its resolutions and the full text of the new Constitution, were laid before Congress; and despite Richard Henry Lee's contention that that body had no power to assist in creating a "new Confederacy of nine," [3] it unanimously resolved, on the 28th, after obliterating every record of opposition, that the report, with the letter and resolutions accompanying the same, be sent to the several legislatures, in order to be submitted to a convention of delegates to be chosen in each state by the people thereof in conformity with the resolves of the Convention.[4] As Article VI provided that "the ratification of the Conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same," the fate of the new system, with its power to regulate commerce in the interest of all, now depended upon the judgments to be rendered by at least nine of them. By reason of the existence of that power, it was most bitterly and stubbornly opposed in the great State of New York, with her splendid harbor so capable of a world-wide commerce, and with rivers flowing directly to the sea, to Delaware and Chesapeake bays, to the Mississippi and to the water-course of the St. Lawrence. She could not lose sight of the fact, sorely as she needed an efficient government, that more than half of the goods consumed in New Jersey, Connecticut, Vermont, and in the western parts of Massachusetts were brought to her harbor and paid impost for its use.[5] Among the malcontents in Virginia was George Mason, who in stating his objections said that the capital crime in the new

Opposition to the commerce clause.

[1] *Madison Papers*, ii, 1599, 1560; Elliot, 555, 556.

[2] Washington's diary for that day.

[3] *Madison Papers*, ii, 643; Elliot, 566.

[4] *Journals of Congress*, iv, 782.

[5] Cf. Williamson to Iredell, July 7, 1788. McRhee's *Iredell*, ii, 227, 228; Bancroft, ii, 339; 232, 297.

system was the grant to Congress of power to regulate commerce by a bare majority vote.[1] For a time from Virginia, with her ample harbors convenient to the ocean, proceeded the Southern opposition to the consolidation of the Union. But the South had been profoundly alarmed when the negotiations between Jay and Gardoqui threatened, in July, 1785, to result in an agreement by which the United States was to pay to Spain as the price of a treaty of reciprocity in commerce the abandonment of the navigation of the Mississippi for a period of twenty-five or thirty years. "There is danger," reported Otto to Vergennes, "that the discussion may become the germ of the separation of the Southern States."[2] That possible alternative frightened even Randolph, who wrote to the Speaker of the House of Delegates of his state, October 10, 1787: "Dreadful as the total dissolution of the Union is to my mind, I entertain no less horror at the thought of partial confederacies. The utmost limit of any partial confederacy, which Virginia could expect to form, would comprehend the three Southern and her nearest Northern neighbor. But they, like ourselves, are diminished in their real force by the mixture of an unhappy species of population."[3] While the jealous Titans thus halted between their local self-interests and their fears, the first step forward was taken by loyal little Delaware, that ratified unanimously December 7, 1787.[4] The moment that an equality of vote in the Senate was conceded, her one element of opposition had disappeared. The lead thus taken by "the Delaware state" was promptly followed by the convention of the great commonwealth from which she had sprung. On December 12, Pennsylvania ratified by a vote of forty-six to twenty-three; and on the 18th of the same month, the people of New Jersey, guided by such men as Brearley, Witherspoon, Neilson, and Beatty, "by the unanimous consent of the members present, agreed to, ratified, and confirmed the proposed constitution and every part thereof." Georgia opened the new year of 1788 with a third unanimous ratification on January 2, attended with an expression of the hope that "her

Negotiations between Jay and Gardoqui, 1785.

Delaware first to ratify, December 7, 1787;

Pennsylvania and New Jersey same month;

Georgia, January, 1788;

[1] George Mason to Washington, Oct. 7, 1787. Sparks, ix, 267, 268, note.

[2] Otto to Vergennes, 10th September, 1786.

[3] Elliot, i, 487.

[4] Ibid., ii, 497, 499.

cheerful assent would tend to consolidate the union" and "promote the happiness of the common country";[1] and on the 9th of the same month, Connecticut — after James Wadsworth had objected to duties on imports as partial to the Southern States — ratified by a vote of one hundred and twenty-eight to only forty against.[2] The next state to speak was Massachusetts, whose people were divided almost equally. It was a critical moment. "The decision of Massachusetts either way," wrote Madison, "will involve the result in New York," and a negative would arouse to active resistance the majority in Pennsylvania. Langdon reported that Rhode Island and New Hampshire would ratify if Massachusetts should act favorably. Bowed down with debts and fresh from the agonies of a suppressed insurrection, the entire population of the western counties that had sided with Shays was bitter against the Constitution, while the larger centres and in general the eastern part of the state favored it. Before Samuel Adams, the helmsman of the Revolution at its origin, had time to express himself, his constituents of the industrial classes at Boston warned him that if the Constitution should be rejected "navigation" would languish and "skillful mechanics be compelled to emigrate, so that any vote of a delegate from Boston against adopting it would be contrary to the interests, feelings, and wishes of the tradesmen of the town." Such was the warning given to the typical home-ruler, who was startled when on entering the new "building, he met with a national government instead of a federal union of sovereign states." Objections came in many forms. The compromise touching the taxation and representation of slaves was bitterly assailed;[3] complaint was made that there was no religious test, that a Papist or an infidel was as eligible as a Christian. James Neal of Maine said that he could not favor "making merchandise of the bodies of men, and unless this objection is removed I cannot put my hand to the Constitution." And last and most of all it was objected that there was no bill of rights. But the leaders of the great assembly were true to the national cause. Fisher Ames,

Connecticut same month.

The struggle in Massachusetts.

Warning to Samuel Adams.

Fisher Ames.

[1] Stevens, *History of Georgia*, ii, 387. A salute of thirteen guns followed the ratification.

[2] *Penn. Packet*, Jan. 24, 1788.

[3] Dawes of Boston answered: "Slavery could not be abolished by act of Congress in a moment; but it has received a mortal wound." Elliot, ii, 41, 149.

after earnestly rebuking the importation of slaves, said: "This constitution is comparatively perfect; no subsisting government, no government which I have ever heard of, will bear a comparison with it. The State Government is a beautiful structure, situated, however, upon the naked beach; the Union is the dike to fence out the flood." [1] And when the time came for the debate to be closed by Stillman, a Baptist minister, he said: "Cling to the Union as the rock of our salvation, and finish the salutary work which hath begun." King had explained already the nature of the mighty transition that was to take place from a league of states, based on the old quota system, to a composite state instituted by the people with the right to execute its own laws directly on individuals.[2] No one did more, however, to remove the gravest difficulty that deterred Massachusetts, as well as many states that were to follow her, than Hancock, who, before putting the question, said: "I give my assent to the Constitution in full confidence that the amendments proposed will soon become a part of the system. The people of this commonwealth will quietly acquiesce in the voice of the majority, and, where they see a want of perfection in the proposed form of government, endeavor, in a constitutional way, to have it amended." [3] On the basis of that noble declaration the battle was won on the 6th, when the bells and the artillery announced the glad tidings after the motion to ratify had been carried by the narrow majority of nineteen votes out of a total of three hundred and fifty-five.[4] But with even that narrow margin opposition vanished; amidst mutual congratulations all "smoked the calumet of love and union."

Hancock.

Battle won February 6.

"The Federalist," 1788.

Early in this critical year, Hamilton, Madison, and Jay were engaged in the publication of the brilliant expositions of the new Constitution contained in "The Federalist," which survives as a permanent contribution to the political literature of the world.[5] In a great case Chief Justice Marshall said: "It

[1] Elliot, ii, 154–159.
[2] Ibid., ii, 54–57.
[3] Ibid., ii, 174–176.
[4] 187 votes against 168. Elliot, ii, 181.
[5] "The undertaking was proposed by Alexander Hamilton to James Madison, with a request to join him and Mr. Jay in carrying it into effect." (Madison in a paper entitled "The Federalist.") "It was undertaken last fall by Jay, Hamilton, and myself. The proposal came from the two former."

is a complete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth." [1]

By Massachusetts the torch was passed on to Maryland, where Washington's influence, supported by that of Madison, on the Maryland side of the Potomac was sorely needed to counteract the movements of the anti-federalists of Virginia, zealous as ever under the leadership of Richard Henry Lee and Patrick Henry, who were doing their utmost to bring about the organization of a Southern Confederacy. But when the convention met at Annapolis, April 21, strengthened as it was by a letter of advice from Washington to Thomas Johnson,[2] it was found that the plan of a confederacy of slaveholding states had not a single supporter. Despite the ravings of Samuel Chase and the intrigues of William Paca, the malcontents were silenced and the Constitution ratified on the 26th, by sixty-three votes against eleven, Paca voting with the majority. Seven of the thirteen had now been secured. In his letter of congratulation to Daniel of St. Thomas Jenifer, of April 27, Washington said: "Seven affirmative without a negative would almost convert the unerring sister. The fiat of your convention will most assuredly raise the edifice." [3] The time had now arrived for the state of Charles Pinckney, the draftsman of the "system," and of Rutledge, the Chairman of the Committee of Detail, to speak. In South Carolina the anti-federalists of Virginia were still intriguing for a Southern Confederacy, while Washington and Madison were as faithful as ever in pleading against them for the Union.[4] Just before the convention was called, a notable scene occurred in the House of Representatives when Charles Pinckney graphically described [5] the novel character of "the federal republic" which was to operate directly on individuals and not on states as corporate persons. When Lowndes,[6] the spokesman of the Virginia opposition, assailed the clause in the Constitution declaring a treaty properly ratified to be the supreme law of the land, Cotes-

Maryland ratified April 26.

South Carolina, May 23.

Pinckney and Lowndes in state legislature.

Madison to Jefferson, August 10, 1788. See Ford's *Federalist*, xxiii, note.

[1] Cohens *v.* Virginia, 6 Wheat. 264.

[2] April 20, 1788, MS.

[3] April 27, 1788, MS.

[4] Madison to Washington, April 10, 1788. *Works*, i, 384, 385.

[5] Elliot, iv, 253–263.

[6] Ibid., iv, 262–265.

worth Pinckney condemned the reasoning as specious, Rutledge adding that "every treaty is law paramount and must operate," not less under the Confederation than under the Constitution.[1] The summit of absurdity was then reached when Lowndes, referring to the Confederation, said: "We are now under a most excellent constitution — a blessing from Heaven, that has stood the test of time, and given us liberty and independence; yet we are impatient to pull down that fabric which we raised at the expense of our blood." [2] When the convention was organized on May 13,[3] with Thomas Pinckney, then governor, as president, Sumter, the leader of the malcontents, put to the test the strength of those who desired to act with the Virginia opposition by moving, on the 21st, for an adjournment for five months.[4] After that motion had been decisively defeated, the Constitution was ratified on the 23d by one hundred and forty-nine votes against seventy-three — more than two to one.[5] Five days later, when the ninth state had yet to speak, Washington wrote to Lafayette: [6] "The plot thickens fast. A few short weeks will determine the political fate of America for the present generation, and probably produce no small influence on the happiness of society through a long succession of ages to come." The "few short weeks" were to be only three in number. On June 21, New Hampshire, which had adjourned her convention to await the action of Massachusetts, followed her example, thus making the ninth state necessary "for the establishment of this Constitution between the states so ratifying the same." The fact was carefully inserted in the record that the vote of fifty-seven against forty-six was taken on Saturday, June 21, at one o'clock in the afternoon, so as to preclude the possibility of the honor of giving life to the new system being claimed by any other state ratifying at a later hour of the same day.[7] And here it may not be amiss to note that among the strenuous opponents of the Constitution in New Hampshire was Captain Ebenezer Webster, the father of one destined to be its mighty expounder and defender.

Convention organized May 13.

New Hampshire ratified June 21.

[1] Elliot, iv, 267–268.
[2] Ibid., iv, 271, 272.
[3] Ibid., iv, 318.
[4] Ibid., iv, 338.
[5] Ibid., iv, 338–340.
[6] May 28, 1788, MS.
[7] Tobias Lear to Washington, June 22, 1788; *Letters to Washington*, iv, 225.

Virginia, June 25.

The debate in the convention of Virginia, which assembled at Richmond on June 2 under the presidency of Pendleton, was terminated on the 25th by Randolph, who in closing said: "The accession of eight states reduces our deliberations to the single question of union or no union." Thus it appears that the deliberations of the great state that had done so much to bring the Federal Convention into being ended in ignorance of the fact that the honor of vitalizing its work had been seized by New Hampshire. Without the advantage that must have followed the knowledge of assured success, the influence of Washington was to be tested in his stronghold by the eloquence and craft of a coalition led by Patrick Henry, Richard Henry Lee, George Mason, John Tyler, Zachariah Johnson, Benjamin Harrison, and Grayson, feebly supported by Monroe. The strength of the opposition had, however, been seriously weakened in advance by South Carolina's crushing blow to the scheme for a Southern Confederacy, the confident anticipation of which event prompted Washington to assure Madison that "the eloquence of eight affirmatives for the Constitution ought to cause even 'the unerring sister' to hesitate." [1] To that victory Washington added the conversion of Governor Randolph, then at the height of his power and popularity.[2] Thus menaced, the malcontents, following the example of Massachusetts, resolved to make no test of strength until the Constitution had been discussed clause by clause. While even Richard Henry Lee was inclined to be more reasonable, Patrick Henry, whose "plans extended contingently even to foreign alliances," [3] was defiant. His boast was that "the other states cannot do without Virginia, and we can dictate to them what terms we please." In that temper he forced the fight, declaring that "the Constitution is the severance of the Confederacy. Its language, 'We the people,' is the institution of one great consolidated national government of the people of all the states, instead of a government by compact with the states for its agents. The people gave the Convention no power to use their name." [4] After George Mason had supported him by saying that "the

Opposition weakened by act of South Carolina.

Patrick Henry.

George Mason.

[1] Washington to Madison, May 2, 1788, MS.

[2] See Washington to Edmund Randolph, Jan. 8, 1788. Sparks, ix, 297.

[3] Carrington to Madison, Jan. 18, 1788, MS.

[4] Elliot, iii, 23.

power of laying direct taxes changed the Confederation. The general government being paramount and more powerful, the state governments must give way to it; and a general consolidated government is one of the worst curses that can befall a nation," [1] Pendleton retorted that "there is no quarrel between government and liberty; the former is the shield and protector of the latter. The expression 'We the people' is a common one, and with me it is a favorite. Who but the people can delegate powers, or have a right to form a government?" [2] And to that Randolph added that "the question is now between union and no union, and I would sooner lop off my right arm than consent to a dissolution of the union." [3] When Henry in eulogizing the English Constitution said: "In the British Government the sword and purse are not united in the same hands, in this system they are. Does not infinite security result from a separation?" [4] Madison answered: "There never was, there never will be, an efficient government in which both the sword and purse are not vested, though they may not be given to the same member of the government. The sword is in the hands of the British King; the purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist." [5] It was, however, against the federal judicial system that Henry directed his bitterest invectives. He charged it with an attempt to abolish trial by jury; with menacing debtors by the clause against the impairment of the obligation of contracts; with endangering the state courts by the number of its tribunals armed with appellate jurisdictions, and with the right to hear controversies between a state and the citizens of another state. Marshall, who was to breathe the breath of life into that system and make it what it is to-day, spoke his first words in its favor in a masterly oration in which he said: "A suit instituted in the federal courts by the citizens of one state against the citizens of another state will be instituted in the court where the defendant resides, and will be determined by the laws of the state where the contract was made. The laws which govern the contract at its formation govern it at its decision. Whether this man or that man succeeds is to the govern-

Pendleton.

Randolph.

Madison.

Federal judiciary assailed.

Marshall.

[1] Elliot, iii, 29–33.
[2] Ibid., iii, 35–41.
[3] Ibid., iii, 25, 26.
[4] Ibid., iii, 387, 388.
[5] Ibid., iii, 393–395.

ment all one thing. Congress is empowered to make exceptions to the appellate jurisdiction of the Supreme Court, both as to law and as to fact; and these exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people." [1] Henry's purpose was to excite the fears of the Virginia planters, who owed ten millions of dollars to British merchants, whose right to sue in the courts of Virginia had been suspended by the legislature largely through his influence. When proceeding on that line he assailed the new Constitution for granting in that matter retrospective jurisdiction, Marshall answered that "there is a difference between a tribunal which shall give effect to an existing right and creating a right that did not exist before. The debt or claim is created by the individual; a creation of a new court does not amount to a retrospective law." [2] After Henry had delivered himself on the prospect for separate confederacies,[3] the hope of which South Carolina had blighted, after Mason, Madison, and Tyler had spoken on the slave trade, which the last-named denounced as "this wicked traffic," [4] after Henry had raised a new cry as to the dangers of emancipation, after Johnson had complained that the bill of rights prepared by the Convention as an amendment to the Constitution did not acknowledge that all men are by nature free and independent, after it was alleged that the adoption of the Constitution would result in the renunciation by the new government of the right to navigate the Mississippi, after Tyler had mourned over his concession of the right to regulate commerce, after the minds of the debtor class had been filled with anxiety as to the effect of the prohibition on the states to issue paper money, — Henry, still defiant, cried out: "Old as I am, it is probable I may yet have the appellation of rebel. But my neighbors will protect me." [5] After he had been pacified, for his nature was genial, he finally said on the last day, "If I shall be in the minority, I shall yet be a peaceable citizen, my head, my hand, and my heart being at liberty to remove the defects of the system in a constitutional way." [6] The steadfast spokesman of Washington had won the day. The

Appeal to Virginia debtors.

Henry's defiant outcry.

[1] Elliot, iii, 556, 557, 558.

[2] Ibid., iii, 539, 546, 561.

[3] He said: "Compared with the consolidation of one power to reign with a strong hand over so extensive a country as this, small confederacies are little evils." Ibid., iii, 161.

[4] Ibid., iii, 454, 455.

[5] Ibid., iii, 546.

[6] Ibid., iii, 652.

patient, the patriotic, the resourceful Madison, supported as he was by Randolph, Marshall, Pendleton, Nicholas, Innes, Corbin, and Henry Lee, saved the fame of the "unerring sister" at a moment when its peril was great indeed. After the dangers incident to a conditional ratification were passed, the roll was called on June 25, upon which eighty-nine delegates voted for the Constitution, while seventy-nine declared against it. Thus by a narrow margin the greatest of the states was rescued from a suicidal policy whose success would have resulted in the destruction of the Union; and in the creation of a series of impotent confederacies. The unconditional ratification, which referred all amendments to the First Congress under the Constitution, was attended with "a few declaratory truths not affecting the validity of the act." [1]

Unconditional ratification.

Madison was no more faithful or helpful to the cause in Virginia than was Hamilton in New York. So long as the Constitution was in peril, these master builders were united by a oneness of purpose which imparted to their relations the charm of intimacy and affection. The influence of "The Federalist," which Hamilton had designed as a means of preparing the people for the acceptance of the great invention, was met by inflammatory tracts and letters from the "Federal Farmer," by Richard Henry Lee, circulated through the federal republicans, whose electioneering centre was the custom-house, then a state institution at New York. A committee of correspondence was formed with branches throughout the country, which drew answers from many who were willing to denounce the new Constitution as "an elective despotism." Back of that opposition was Governor Clinton, whose unpatriotic policy had, at a critical moment, withdrawn Yates and Lansing from the Convention, he declaring unreservedly at the time that no good was to be expected from the proceedings at Philadelphia.[2] In that hostile spirit the governor, at the regular meeting of the legislature in January, 1788, while recommending the encouragement of manufactures and commerce, sent in the proceedings of the Federal Convention without a word.[3] However, upon the

New York ratified July 26.

The "Federal Farmer."

[1] Madison to Washington, in Rives, ii, 608. The rights of the states were guarded by the assertion "that every power not granted by the Constitution remains for the people of the United States and at their will." Elliot, iii, 656.

[2] *Penn. Packet*, 26th July, 1787.

[3] *Ind. Gazetteer*, Jan. 19, 1788.

motion of Benson, a convention was ordered which met at Poughkeepsie June 17, under the presidency of Clinton, who was supported by Yates and Lansing, Samuel Jones, an eminent member of the New York Bar, and Melancthon Smith, a man of religious temper who is said to have been gifted with the power of moderation. That group was confronted by Hamilton, Jay, Livingston, then chancellor of the state, Chief Justice Morris, Hobart, and Duane. When, on the 19th, Livingston opened the debate, after demonstrating the advantages of a composite state over a mere league, he asserted that without a strong federal government New York was incapable of self-defense, surrounded as she was with British posts within her limits capable of forming connections with hostile Indian tribes whereby the city might be held in defiance of treaties.[1] After Lansing and Melancthon Smith had discharged their artillery, Hamilton was cheered on the 24th by tidings brought by swift riders that New Hampshire as the ninth state had ratified the Constitution. But Clinton still stood undaunted, denouncing his opponents as "the advocates of despotism," notably Hamilton, who "had in substance, though not explicitly, thrown off the mask, his arguments tending to show the necessity of a consolidated continental government to the exclusion of any state government." Thus beset, Hamilton wrote to Madison, saying, "Our chance of success depends upon you. Symptoms of relaxation in some of the leaders authorize a gleam of hope if you do well, but certainly I think not otherwise." [2] On the very next day the Virginia Convention acted favorably, but it was not until July 3 that the assembly at Poughkeepsie, while still considering the Constitution and proposed amendments, received the glad tidings of the unconditional ratification. From that time the only question was whether or no New York would so ratify. On the 10th Lansing offered a bill of rights to which no one objected, but with it he coupled numerous amendments [3] which were made conditions of ratification; and on the next day Melancthon Smith added a resolution which proposed in substance that New York would join the Union, reserving the right to withdraw from it if the proposed amendments were not accepted.[4] In the midst of

Convention met at Poughkeepsie, June 17.

Debate opened by Livingston.

Hamilton.

Bill of Rights offered.

[1] Elliot, ii, 208–216.
[2] Hamilton's *Works*, i, 462.
[3] *Penn. Packet*, July 18, 1788.
[4] For Hamilton's crushing speech

that new peril Hamilton appealed to Madison, who had returned to Philadelphia; and on the 21st, he was able to read to the convention the answer in which he said: "My opinion is, that a reservation of a right to withdraw, if amendments be not decided on under the form of the Constitution within a certain time, is a conditional ratification; that it does not make New York a member of the new Union, and, consequently, that she could not be received on that plan. The Constitution requires an adoption *in toto* and forever." [1] Under the pressure of that opinion from Madison it was resolved that New York, following in the footsteps of Massachusetts, would be content with the declaration of Hancock, and make no conditions, and thus ratify "in full confidence" of the adoption of all necessary amendments. Not, however, until it was agreed unanimously that a circular letter should be laid before the different legislatures recommending a general convention to act upon all proposed amendments, was that step finally taken on the 26th, by a vote of thirty against twenty-seven. It is comforting to know that in the midst of the unbounded enthusiasm that pervaded every class as the citizens of New York marched in a procession of unparalleled splendor, homage was paid to the victor in the form of a miniature ship drawn through the streets bearing the name of Hamilton. If Madison and Charles Pinckney did more to force "the new system" through the Federal Convention, neither surpassed him, either in zeal or efficiency, when the time came to secure its ratification by the state conventions that gave it their approval.

Madison's letter.

Hamilton's triumph.

Not until November 21, 1789, sometime after the new government was in motion, did North Carolina come into the Union. Her convention had assembled at Hillsboro as early as July 21, 1788, under the presidency of Johnson, then governor, the dominating intellectual force being James Iredell, afterward appointed to the Supreme Bench of the United States, who was ably supported by William R. Davie, Samuel Johnson, Richard Dobbs Spaight, and Archibald Maclaine. For a long time there was doubt and hesitation. Willie Jones, who controlled the majority, said: "We do not determine on the Constitution; we neither reject nor adopt it; we leave ourselves

North Carolina ratified November 21, 1789.

[1] Hamilton's *Works*, i, 465. of the 19th against that proposal, see *Works*, ii, 467–471.

at liberty; there is no doubt we shall obtain our amendments and come into the Union." [1] Not until properly assured on that point did North Carolina finally withdraw all opposition and ratify at Fayetteville at the time stated. On May 29, 1790, Rhode Island, the only state that did not participate in the proceedings at Philadelphia, after forcing the call of a convention by an accidental majority of one,[2] yielded to the fear of remaining in isolation, and, at the eleventh hour, bowed to the inevitable.

Rhode Island, May 29, 1790.

Thus ended in triumph the great drama in the history of humanity that opened with the invention of the "wholly novel theory," February 16, 1783, and closed with its final acceptance as a working system of government by the last of the thirteen states, May 29, 1790. Its first act was one of creation proceeding from a single mind that wrought a revolution in political science by making an entirely new combination of political principles without a prototype in history. Its second act was one of adaptation proceeding from an organized body of marvelous men, at once so scientific and so practical as to be able to readjust a novel and highly complex political theory and then apply it as a working system of government under the most difficult of all circumstances. Its third act was one of coercion proceeding from the combined pressure of a set of compelling conditions backed by the driving force of an almost irresistible personality intent upon saving the states from anarchy by subjecting them to the common yoke of an equitable and indestructible union. The intellectual side of the movement finds its source in a man of contemplation, who worked behind a curtain which, until now, has almost concealed him from the view of the world. The material and political side of the movement finds its driving force in the Titanic form of a man of action, who, without effort, impressed all mankind from the outset with the grandeur of his achievements. Such is the relation in which Pelatiah Webster stands to Washington.

Summary.

[1] In the mean time it was agreed that any impost Congress might impose should be collected in North Carolina by the state "for the use of Congress." See Bancroft, ii, 349–350.

[2] How that was accomplished is told in a letter from Rhode Island published in the *New York Packet*, February 20, 1790. See Andrews, *History of the United States*, i, 240.

Congress notified of action of nine states, July 2, 1788.

By a resolution of the Federal Convention it was provided that each state convention, assenting to or ratifying the new Constitution, "should give notice thereof to the United States in Congress assembled." As early as July 2, 1788, Congress was thus notified that the Constitution had received the approval of nine states. Not, however, until more than two months had been wasted in a contention as to the permanent seat of the new government, fixed temporarily at New York, did Congress, on September 13, set the first Wednesday in January, 1789, for the choice of electors of President in the several states, the first in February for their ballot, and the first in March for the commencement of proceedings under the new system. As the first Wednesday in March, 1789, was the 4th, that date has since been retained as the initial one for congresses and presidencies. In deference to the dilatory practice of the past there was no quorum in either branch of the First Congress on March 4. When on April 6 the Senate chose John Langdon as its president, the House of Representatives, which had formed its quorum on April 1, was immediately summoned, and in the presence of the two houses he opened and counted the votes, every one of the sixty-nine, cast by the ten states that took part in the election, being for Washington. As John Adams had thirty-four votes, no other obtaining more than nine, he was declared Vice-President. After casting upon the Senate the duty of notifying the chosen ones of their election, the House proceeded to business. The strangest, the most unique of all political crafts was now under way, with the greatest of all pilots at the prow. After holding its first session at New York, the First Congress on December 6, 1790, removed to Philadelphia, chosen by the Act of July 16, 1790, as the temporary seat of government. There Congress remained until the second session of the Sixth (1800), when under the Act approved April 24[1] of that year the President was authorized to direct the removal of the various executive departments to the city of Washington at any time after the adjournment of the first session of the Sixth Congress and before the time fixed by the Act of July 16, 1790,[2] for the transfer of the seat of government

Choice of electors ordered September 13.

Votes for President and Vice-President counted April 6.

Washington became seat of government, 1800.

[1] 2 Stats. 557.

[2] By that act it was provided "that on the said first Monday in December, in the year one thousand eight hundred, the seat of the Government of the United States shall,

to that place. On the day of the first meeting of the Supreme Court in the permanent capitol of the nation, February 4, 1801, Marshall took his place for the first time as Chief Justice, and as such he sat in the midst of six associates, for thirty-four years.

by virtue of this act, be transferred to the District and place aforesaid," the place referred to being the portion of the District selected for the federal city.

# CHAPTER VIII

## THE FIRST TWELVE ARTICLES OF AMENDMENT

New Constitution not prefaced by a bill of rights.

THE position of those who opposed the adoption of the new Constitution because it was not prefaced by a bill of rights was neither factious nor unreasonable. When the new state constitutions came into existence, the tendency was general to preface them with bills of rights in which were epitomized, as explained heretofore,[1] all of the seminal principles of the English Constitution for the protection of the citizen against the Crown, as those principles had been re-defined in the glorious Revolutions of 1640 and 1688. At the base of that body of protective constitutional law was that part of Magna Carta (chapter 39) out of which grew the modern conception of "due process of law." As the Supreme Court has expressed it: "The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guaranties of the rights of the subject against the oppression of the Crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the states as further limitations upon the power of the Federal Government, it is found in the Fifth, in connection with other guaranties of personal rights of the same character. Among those are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offense; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation."[2] Magna Carta as "a sacred text, the nearest approach to a 'fundamental statute' that England has ever had,"[3] was interpreted

Lack supplied by a series of amendments proposed by the states.

Varying interpretation of Magna Carta.

[1] See above, p. 76 *sq.*

[2] Davidson *v.* New Orleans, 96 U. S. 97.

[3] Pollock and Maitland, *Hist. of Eng. Law*, 2d ed., i, 173.

in each age according to the necessities of the times. With the broad construction put upon it by the statesmen and lawyers of the seventeenth century during the constitutional struggles with the Stuarts, which construction became fixed in the commentaries of Coke and Blackstone, it became at the close of the American Revolution the corner-stone of American constitutional law.[1] Upon that base were superimposed the more modern principles defined during the Revolutions of 1640 and 1688, and embodied in the Acts of the Long Parliament (1640–1641), the Petition of Right (1628), the Habeas Corpus Act (1679), the Bill of Rights (1689), and the Act of Settlement (1700–1701),[2] which Hallam has characterized as "the seal of our constitutional laws, the complement of the Revolution itself and the Bill of Rights, and the last great statute which restrains the power of the Crown."[3] Out of England's fundamental statutes were fabricated the bills of rights by which the first state constitutions were prefaced, and out of those bills of rights were coined the first nine amendments to the Constitution of the United States.

Supplemented by modern principles.

In the Federal Convention, Randolph, "animadverting on the indefinite and dangerous power given by the Constitution to Congress, expressing the pain he felt at differing from the body of the Convention on the close of the great and awful subject of their labors, and anxiously wishing for some accommodating expedient which would relieve him from his embarrassments, made a motion importing 'that amendments to the plan might be offered by the state conventions, which should be submitted to, and finally decided on by, another general convention.'"[4] Gerry then said that he could get over all his difficulties "if the rights of the citizens were not rendered insecure — first, by the general power of the legislature to make what laws they may please to call 'necessary and proper'; secondly, to raise armies and money without limit; thirdly, to establish a tribunal without juries, which will be a Star Chamber as to civil cases. Under such a view of the Constitution, the best that could be done, he conceived, was to provide for a second general convention."[5] While all the states answered

Randolph and Gerry demand amendments.

[1] See above, p. 76.
[2] Cf. *The Origin and Growth of the Eng. Const.*, ii, 308; 268; 380; 414.
[3] *Const. Hist.*, iii, 196.
[4] *Madison Papers*, iii, 1593.
[5] Ibid., iii, 1595.

no to that proposal, the conviction lingered that certain amendments limiting the sovereign powers of the new system, especially the legislative power, should be promptly adopted.

Fears of Pelatiah Webster.

Pelatiah Webster was evidently oppressed by the fears expressed by Randolph and Gerry, when he said with solemn emphasis: "But now the great and most difficult part of this weighty subject remains to be considered, viz., how these supreme powers are to be constituted in such manner that they may be able to exercise with full force and effect the vast authorities committed to them, for the good and well-being of the United States, and yet be so checked and restrained from exercising them to the injury and ruin of the states, that we may with safety trust them with a commission of such vast magnitude — and may Almighty Wisdom direct my pen in this arduous discussion." As stated heretofore he proposed to meet the difficulty by a provision "that the powers of Congress, and all the other departments, acting under them, shall all be restricted to such matters only of general necessity and utility to all the states as cannot come within the jurisdiction of any particular state, or to which the authority of any particular state is not competent: so that each particular state shall enjoy all sovereignty and supreme authority to all intents and purposes, excepting only those high authorities and powers by them delegated to Congress, for the purposes of the general Union." As the Convention did not see fit so to limit the powers of the new system it is very natural that an obstructionist like Lee should have contended, after the submission of it to Congress in September, that it should be restrained by a bill of rights, with provisions relating to the freedom of speech and the press, to the rights of conscience, to trial by jury in civil cases as well as criminal, to freedom of elections, to the prohibition of standing armies, to the independence of the judges, to security against excessive bail, fines, or punishments, to unreasonable searches or seizures of persons, houses, papers, and property, and to the right of petition.[1] After Congress had acted adversely on Lee's suggestion, the subject

Lee's demand for a bill of rights.

[1] "Where," said Lee, "is the contract between the nation and the government? The Constitution makes no mention but of those who govern, and never speaks of the rights of the people who are governed." Minister Otto to Count Montmorin, New York, Oct. 23, 1787. Bancroft, ii, 227.

of amendments was renewed with vigor in the several state conventions to which the Constitution was referred. As stated heretofore, a happy solution was offered by the convention of Massachusetts, which agreed unconditionally, in the words of Hancock, "to the Constitution, in full confidence that the amendments proposed will soon become a part of the system. The people of this commonwealth will quietly acquiesce in the voice of the majority, and, where they see a want of perfection in the proposed form of government, endeavor, in a constitutional way, to have it amended." [1] Before Hancock made that statement, amendments had been offered by himself and others, — one set embracing the general declaration which reserved to the states or the people the powers not delegated to the United States; another embodying certain restraints upon the powers granted to Congress with respect to direct taxes, elections, the commercial power, the jurisdiction of the courts, and to the holding of titles or offices conferred by foreign sovereigns; while a third related to the presentment by a grand jury for crimes by which an infamous or a capital punishment might be inflicted, and to trial by jury in civil actions at common law between citizens of different states. Madison promptly adopted and commended the policy of Massachusetts. Writing to Randolph on April 10, 1788, he said: "A conditional ratification or a second convention appears to me utterly irreconcilable with the dictates of prudence and safety. Recommendatory alterations are the only ground for a coalition among the real Federalists." [2] Upon that basis the state conventions ratified unconditionally, with the tacit understanding that a bill of rights would be offered to the states by the First Congress in the form of amendments to be adopted in the mode prescribed by the new Constitution.

Subject of amendments in state conventions.

The Massachusetts precedent.

Commended by Madison.

Into the First Congress, organized for business April 6, 1789, were introduced 189 bills, 46 in the Senate and 143 in the House. Into the Sixtieth Congress the total number introduced was about 40,000. The House committees of the First Congress were elected by the House itself. During the Second they were sometimes elected and sometimes appointed. Not until the Fourth did the exclusive power of appointment pass

Composition of First Congress.

[1] See above, p. 210.

[2] Madison's *Works*, i, 386, and 376–379.

into the Speaker's hands. From that time onward the growth of his powers represents an evolution whose advance synchronizes with the growth of the business of the House.[1] Among those who passed from the Federal Convention to the new Congress may be mentioned Langdon of New Hampshire, Ellsworth and Johnson of Connecticut, Rufus King of New York, Robert Morris of Pennsylvania, Gouverneur Morris, then of New York, Caleb Strong of Massachusetts, Paterson of New Jersey, Dickinson and Bassett of Delaware, Alexander Martin and Blount of North Carolina, Charles Pinckney and Butler of South Carolina, and Colonel Few of Georgia, all of whom became Senators. The following became members of the House of Representatives: Madison of Virginia, Sherman of Connecticut, Gilman of New Hampshire, Baldwin of Georgia, Dayton of New Jersey, Gerry of Massachusetts, Fitzsimons of Pennsylvania, Carroll of Maryland, and Spaight and Williamson of North Carolina.[2] In order to put the new judicial machinery in motion it was necessary for the First Congress to enact the famous Judiciary Act of 1789. "That great act was penned by Oliver Ellsworth, a member of the Convention which framed the Constitution, and one of the early Chief Justices of this Court. It may be said to reflect the views of the founders of the Republic as to the proper relations between the federal and state courts." [3] After providing for the organization of the Supreme Court, the Judiciary Act, in order further to vitalize the grant of judicial power contained in the Constitution, created thirteen primary courts, known as District Courts, with exclusive jurisdiction of certain crimes described in the Act, of all civil cases of admiralty and maritime jurisdiction, and of all suits for penalties and forfeitures incurred under the laws of the United States. To the District Courts was also given jurisdiction, concurrently with the courts of the several states, or the Circuit Courts, as the case may be, of certain cases arising under the law of nations, or treaties, of certain suits at common law where the United States is plaintiff, and of certain suits exclusive

Organization of the judiciary.

Supreme Court.

District Courts.

[1] See the author's article on "The Speaker and his Powers," in *North Am. Review* for October, 1908.

[2] Cf. Andrews, *History of the United States*, i, 236–237. Sherman, Gilman, and Baldwin were promoted to the Senate.

[3] Mr. Justice Field, in Virginia *v.* Rives, 100 U. S. 338.

of the courts of the several states, against consuls or vice-consuls. The districts, excepting those of Maine and Kentucky, were, at the outset, grouped in three circuits, the eastern, middle, and southern; and it was provided that there should be held annually in each district of said circuits, two courts, which should be called Circuit Courts, and should consist of any two justices of the Supreme Court, and the district judges of such districts. The Circuit Courts thus created were endowed with original cognizance — concurrently with the courts of the several states — of certain cases, with exclusive cognizance of certain crimes and offenses against the United States, and with jurisdiction — concurrently with the District Courts — of certain other crimes defined in the Act. In the Circuit Courts was also vested appellate jurisdiction over the District Courts, "under the regulations and restrictions hereinafter provided." To the Supreme Court of the United States was likewise given "appellate jurisdiction from the Circuit Courts and courts of the several states, in the cases hereinafter specially provided for." [1]

Circuit Courts.

While Ellsworth thus wrought in the judicial order, Madison undertook the preparation of the bill of rights promised by the friends of the new Constitution as an inducement to its adoption. By common consent the leadership of the House seems to have been conceded to Madison by reason of his ability, of his thorough familiarity with the new Constitution, and of his methodical habits. Under his business management everything was brought forward in its proper order. After facilitating the passage of an impost bill to provide necessary revenue, he was active in organizing the administrative machinery indispensable to its appropriation. Resolutions to create the departments of Foreign Affairs, of the Treasury, and of War were offered by Madison, — the principle of removability by the President, with regard to the heads of departments, being incorporated as to all of them. During the same Congress an act was passed adding additional duties, relating to domestic administration, to the Department of Foreign Affairs, henceforth to be known as the "Department of State," whose principal officer was designated as the "Secretary of State." With these preliminary matters disposed of, Madison deemed

Madison leader of the House.

Administrative machinery.

[1] Cf. Taylor, *Jurisdiction and Procedure of the Supreme Court of the United States*, 20–23.

it his duty to direct the attention of Congress to the importance of removing, by a wise exercise of the power of amendment, the honest doubts and apprehensions existing with regard to the security of the rights of the people under the new system. He took the first step on June 8, when he introduced a series of propositions, offering the desired guarantees, in the form of twelve amendments. "It appears to me," he said, "that this House is bound, by every motive of prudence, not to let their first session pass over, without proposing to the state legislatures something to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States as it has been found to be to a majority of them. It will be desirable to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and freely bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be engrafted so as to give satisfaction to the doubting part of our fellow citizens, the friends of the Federal Government, by yielding them, will evince that spirit of deference and concession for which they have been hitherto distinguished." In the words of Rives, "The amendments proposed by Mr. Madison were, therefore, mainly in the nature of a Declaration of Rights, placing the freedom of speech, the freedom of the press, freedom of religion, the security of property, personal liberty, trial by jury, and in general every right and power of the people not delegated or surrendered, under the ægis of the Constitution, and by an express interdiction, beyond the reach of the Government." [1] The amendments, finally agreed to after prolonged discussion, were essentially those which Madison proposed, and in due time ten of them were ratified by the states. Of the two that were rejected one was designed to secure a fuller representation of the people at the outset of the government, the other to restrain Congress from voting themselves an increase of compensation to take effect during the current term of representative service. Madison's commendable effort did not succeed, however, without sharp opposition from Sherman, Vining, Smith of South Carolina, and Jackson of

Twelve amendments offered June 8, 1789.

A Declaration of Rights.

Ten amendments adopted.

[1] Rives, *The Life and Times of James Madison*, ii, 38–46.

Georgia. The last named went so far as to declare that "our instability will make us objects of scorn; not content with two revolutions in less than fourteen years, we must enter upon a third." Congress prefaced its resolutions, proposing amendments to the Constitution, — twelve in number, — with this preamble: "The conventions of a number of the states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution," etc. Thus the fact was fixed in the record that the proposed amendments were intended simply to prevent misconstruction or abuse of powers by declaratory and restrictive limitations. It has been settled from the outset by a long list of authorities that the ten amendments actually adopted are to be regarded as limitations on the powers of the Federal Government and not upon the powers of the states.[1] The first ten amendments were proposed to the legislatures of the several states by the First Congress, on September 25, 1789; and they were ratified by the following states, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress in the following order: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791; and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the legislatures of Massachusetts, Connecticut, and Georgia ever ratified them. They are entitled "Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several states, pursuant to the Fifth Article of the Original Constitution."

Preamble.

Proposed to legislatures, September 25.

[1] Barron *v.* Baltimore, 7 Pet. 243; Fox *v.* Ohio, 5 How. 410; Twitchell *v.* Pennsylvania, 7 Wall. 321; United States *v.* Cruikshank, 92 U. S. 542; Spies *v.* Illinois, 123 U. S. 131; Re Sawyer, 124 U. S. 200; Davis *v.* Texas, 139 U. S. 651; McElvaine *v.* Brush, 142 U. S. 155; Miller *v.* Texas, 153 U. S. 153; Brown *v.* New Jersey, 175 U. S. 172.

Religious liberty.

Article 1 provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The founders of the Republic fled from a state church which persecuted with impartial severity Roman Catholics and Protestant non-conformists through two sets of cruel statutes decorated on the one hand by the famous Test Act (25 Car. II, c. 2), passed "for preventing dangers which may happen from Papish recusants," and on the other by the infamous Conventicle Act (16 Car. II, c. 4), whereby every person above sixteen years of age present at a conventicle (defined as "any meeting for religious worship at which five persons were present besides the household") was subjected to the penalty of three months' imprisonment for the first offense, to six for the second, and for the third to seven years transportation, after conviction by jury. These persecuting statutes were not abolished in England until very recent times.[1] When in 1889 the Supreme Court was called upon, in the case of the Mormon Church *v.* United States,[2] to pass upon the constitutionality of the Act of 1887 disestablishing that church and abrogating its charter, it was held to be constitutional, really upon the ground that Congress did not possess the right originally to establish the church under the Amendment. As the territorial legislature derived all its powers from Congress, it could not do what its creator could not do. Under such conditions the only alternative was the disestablishment of the church, and the placing of it, as to the free exercise of its religious views, upon the same footing as all other religious societies. But little need be said as to the clause forbidding Congress to pass any act "abridging the freedom of speech, or of the press," as that clause has been removed from the Constitution, so far as the mails are concerned, by the judgment rendered in 1892, *In re* Rapier, wherein it was held that Congress possesses the power to establish and maintain, as to the contents of the mails, an *Index Expurgatorius*, once vested in the Star Chamber.[3]

Mormon Church.

Freedom of speech and the press.

[1] Taylor, *The Origin and Growth of the Eng. Const.*, ii, 371, 365, 425.

[2] 136 U. S. 1; 130 U. S. 145.

[3] 143 U. S. 110. Great astonishment was expressed when the Supreme Court announced that start-

By that decision an executive officer of the post office may exclude from the mails, without trial by jury, any newspaper which contains printed matter regarded by Congress "as injurious to the people." When in 1836 President Jackson attempted to procure the passage of just such an act, forbidding the circulation through the mails of incendiary literature concerning slavery, it was defeated. Daniel Webster, who trampled the proposition under foot in the Senate, said on stating the case: "The bill provided that it should not be lawful for any deputy postmaster, in any state, territory, or district of the United States, knowingly to deliver to any person whatever, any pamphlet, newspaper, handbill, or other printed paper or pictorial representation, touching the subject of slavery, where, by the laws of said state, district, or territory, their circulation was prohibited. . . . Even the Constitution of the United States might be prohibited; and the person who was clothed with the power to judge in this delicate matter was one of the deputy postmasters." In denouncing that monstrous proposal, Webster said that "the bill conflicted with that provision in the Constitution which prohibited Congress from passing any law to abridge the freedom of speech or of the press. What was the liberty of the press? he asked. It was liberty of printing as well as the liberty of publishing, in all the ordinary modes of publication; and was not the circulation of papers through the mails an ordinary mode of publication? He was afraid that they were in some danger of taking a step in this matter that they might hereafter have cause to regret, by its being contended that whatever in this bill applies to publications touching slavery, applies to other publications that the states might think proper to prohibit; and Congress might, under this example, be called upon to pass laws to suppress the circulation of political, religious, or any other description of publications which produced excitement in the states."[1]

Jackson's assault trampled on by Webster.

Webster's worst fears have been realized. By the statute involved in the case in question, and others of like character, the mails of the United States have been put under a congres-

ling result in a judgment unsupported by an opinion. Subsequently Chief Justice Fuller filed a very brief opinion, which disclosed the fact that the Court had been unable to find either authority or adequate reason upon which to rest its judgment.

[1] Benton, *Thirty Years' View*, i, 586.

sional censorship that may be extended to any subject which that body may see fit to add to its *Index Expurgatorius*. The last clause of Article I is simply a restatement of that provision of the Bill of Rights (1689) which provides "that it is the right of the subject to petition the King, and all commitments and prosecutions for such petitioning are illegal." [1] So jealous were the Commons of the exercise of the right that in 1701 they imprisoned five of the Kentish petitioners until the end of the session, for praying the House to attend to the voice of the people and turn its loyal addresses into bills of supply. In United States *v.* Cruikshank [2] it was held (1) that the First Amendment, which prohibits Congress from abridging the right of the people to assemble and to petition the Government for a redress of grievances, was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the National Government only; (2) that the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the National Government, existed long before the adoption of the Constitution as an attribute of national citizenship, and, as such, is under the protection of and guaranteed by the United States.

Right of petition.

Right to keep and bear arms.

Article II provides that "a well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The roots of this Article strike down into the past until they reach the Assize of Arms [3] of Henry II (1181), whereby the old constitutional force was reorganized by the duty being imposed upon every free man, for the defense of the state, to provide himself with arms according to his means. The ancient landfyrd, the militia of the shire, survived the Norman Conquest, and its aid was more than once invoked in great emergencies by the Conqueror and his sons. The object of Henry's Assize of Arms was to reorganize and rearm the ancient force as a body safer and more trustworthy for national defense than the feudal

Object of Assize of Arms.

[1] The practice of petitioning on political subjects came into use during the period of the Great Rebellion. Many petitions were presented to Charles I and to the Long Parliament.

[2] 92 U. S. 542.

[3] Hoveden, ii, 261; Benedictus, 278.

host.[1] According to "The Federalist" this limitation indicates that the security of liberty against the tyrannical tendencies of power is only to be found in the right of the people to keep and bear arms with which to resist oppression. In Presser *v.* Illinois [2] the Supreme Court — after holding that the provision, that "the right of the people to keep and bear arms shall not be infringed," is a limitation only on the powers of Congress and the National Government — declared that in view of the fact that all citizens capable of bearing arms constitute the reserved military force of the National Government as well as in view of its general powers, the states cannot prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security.

Presser *v.* Illinois.

Article III provides that "no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but in a manner to be prescribed by law." This prohibition is based on that part of the Petition of Right (7th June, 1628) which provides that "whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their will have been compelled to receive them into their houses, and there to suffer them to sojourn against the laws and custom of this realm, and to the great grievance and vexation of the people." By Stat. 31 Car. II, c. 1, it is enacted that no officer, military or civil, or other persons, shall quarter or billet any soldier upon any inhabitant of this realm without his consent, and that every such inhabitant may refuse to quarter any soldier, notwithstanding any order whatsoever. The provisions of that statute and also of the Petition of Right against billeting are annually suspended in England by the Mutiny Act, which expressly gives permission to billet soldiers at inns and victualing-houses.

Billeting of soldiers prohibited.

Stat. 31 Car. II, c. 1.

Article IV provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be

General warrants prohibited.

[1] *The Origin and Growth of the English Constitution*, i, 312.
[2] 116 U. S. 252.

searched, and the persons or things to be seized." The motive of this Article was to embody in American constitutional law the fruits of the victory won in England in 1765, when what are known as general warrants were declared illegal. In the effort to destroy the freedom of the press, by a strained exercise of the prerogative a general warrant was issued in 1763 for the discovery and apprehension of the authors and printers (not named) of the obnoxious No. 45 of the *North Briton*, which commented in severe and offensive terms on the King's Speech at the prorogation of Parliament and upon the unpopular Peace of Paris recently (February 10, 1763) concluded.[1] Forty-nine persons, including Wilkes, were arrested under the general warrant; and when it was ascertained that Wilkes was the author, an information for libel was filed against him on which a verdict was obtained.[2] In suits afterward brought against the Under-Secretary of State who had issued the general warrant, Wilkes,[3] and Dryden Leach, one of the printers arrested on suspicion, obtained verdicts for damages. When the matter came before the King's Bench in 1765, Lord Mansfield and the other three judges pronounced the general warrant illegal, declaring that "no degree of antiquity could give sanction to a usage bad in itself."[4] When in Boyd *v.* United States[5] an attempt was made to enforce a penalty under the customs acts, — providing that the prisoner must produce the invoice in court for the inspection of the government attorney or else be taken to confess the offense, — it was held that such a provision was obnoxious to the Article in question because equivalent to compulsory production of papers, and also to a subsequent Amendment because it compelled the accused to produce evidence against himself. It was subsequently held in the case of Spies *v.* United States,[6] wherein it was claimed that in a state court the papers of the accused had been seized without warrant and contrary to the Amendment, that it did not apply because it limited only the powers of the Federal Government and not of the states.

No. 45 of *North Briton.*

Mansfield' judgment.

[1] *Parl. Hist.*, xv, 1331, n.; Lord Mahon's *Hist.*, v, 45; Adolphus's *Hist.*, i, 116.

[2] Rex *v.* Wilkes, 4 Burr, 2527, 2574.

[3] Wilkes *v.* Wood, 19 State Trials, 1153.

[4] Leach *v.* Money, 19 State Trials, 1001. Denman's Brown's *Const. Law*, 522 *seq.*

[5] 116 U. S. 616.

[6] 123 U. S. 131.

Guarantees of due process of law.

Article v provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or in public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Into Articles v, vi, and vii are condensed the guarantees of due process of law, springing from Article xxxix of the Great Charter and from the English jury system, grand and petit, as that system existed at the time of the severance of the colonies from the mother country. Nothing more can be attempted than a statement of the essence of the judicial literature that has grown up around each Article since its adoption.

Perpetuation of the grand jury in federal courts;

The purpose of the first clause of Article v was to perpetuate the grand jury as an instrument for the prosecution of serious crimes in the courts of the United States. It has been held that it was not the purpose of the due process of law clause of Article xiv to perpetuate that institution in the states. In Hurtado *v.* California[1] it was said: "We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That Article makes specific and express provision for perpetuating the institution of the grand jury so far as it relates to prosecutions for the more aggravated crimes, under the laws of the United States. . . . According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important Amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the states, it was in the same sense and

[1] 110 U. S. 516.

with no greater extent; and that if in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the Fifth, express declarations to that effect." For a reëxamination of the question at a later day, see Maxwell *v.* Dow.[1] Thus it appears that the Fifth Article is a limitation upon the powers of the National Government, while the Fourteenth is a limitation upon the powers of the states.[2] Under the Fifth it is necessary that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, an essential to a valid trial, was taken in the trial court; otherwise the judgment will be erroneous.[3] It is also the right of the accused to be present during the whole trial, a right of which he cannot be deprived even with his consent.[4] The clause which provides that "no person . . . shall be compelled to be a witness against himself" has been recently considered in Twining *v.* New Jersey,[5] in which it was held that exemption from self-incrimination, though secured as against federal action by Article v, is not one of the fundamental rights of national citizenship, so as to be included among the privileges and immunities of citizens of the United States which the states are forbidden by Article xiv to abridge. The very learned and exhaustive opinion delivered in that case by Mr. Justice Moody was one of many evidences of his growing fame as a jurist at the moment when ill health most unfortunately deprived the Court and the country of his valuable services, an event lamented by every member of the bar. The all important clause that "no person shall be . . . deprived of life, liberty, or property without due process of law" was first expounded in Murray's Lessee *v.* Hoboken Land and Improvement Co.,[6] in which the Court, speaking through Mr. Justice Curtis, said: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law

but not in state courts.

Exemption from self-incrimination.

"Due process" traced to Magna Carta.

[1] 176 U. S. 581.

[2] Spies *v.* Illinois, 123 U. S. 131, 166.

[3] Crain *v.* United States, 162 U. S. 625.

[4] Lewis *v.* United States, 146 U. S. 372.

[5] 211 U. S. 78.

[6] 18 How. 272.

of the land,' in Magna Carta. Lord Coke in his commentary on those words (2 Inst. 50) says they mean due process of law." Following in the path thus marked out, Mr. Justice Miller, in Davidson *v.* New Orleans,[1] said: "The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land' in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guaranties of the rights of the subject against the oppression of the Crown." An effort has been heretofore made to demonstrate that these eminent justices fell into a grave historical mistake when they thus assumed that the meaning of "due process of law" should be accepted by American courts in the limited sense in which it was understood by Coke in 1632, prior to the great Revolutions of 1640 and 1688 by which it was given a vastly wider significance. It was then said that the draftsmen of our first constitutions would have recoiled with horror at the thought that they were founding American constitutional law upon the ancient English Constitution as it existed in 1632 —with the Star Chamber and High Commission intact —and not upon the reformed English Constitution, as Blackstone described it in the first book of his famous "Commentaries," put in their present form in 1758.[2] After declaring in Barron *v.* Baltimore[3] that the final clause, "nor shall private property be taken for public use, without just compensation," is intended "solely as a limitation on the exercise of power by the Government of the United States," Marshall, C. J., said: "But it is universally understood, it is part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the General Government —not against those of the local governments."

A grave historical mistake.

Barron *v.* Baltimore.

[1] 96 U. S. 97. [2] See above, p. 78. [3] 7 Pet. 243.

Jury trials in criminal cases safeguarded.

Article VI provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." In the original Constitution (Art. III, Sec. 2, Clause 3) it is provided that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." By the Fifth Article, just considered, careful provision was made as to the method of accusation by "presentment or indictment of a grand jury," provided the accused was charged with "a capital, or otherwise infamous crime." By the Sixth every safeguard is provided for a speedy and public trial by petit juries of accusations thus made, including every material detail of the proceedings as to the accusation, counsel, and witnesses. In Mattox *v.* United States [1] it was held that the clause providing that the accused must be confronted with the witnesses against him was not violated by the use upon the second trial for the offense of the copy of the testimony of a dead witness given upon the first trial when the accused was confronted by the witness. In Motes *v.* United States [2] it was held, however, that the right of the accused to be confronted with witnesses against him is violated by permitting to be read at the final trial a deposition or statement of an absent witness taken at an examination trial, when it does not appear that the witness was absent at the suggestion, connivance, or procurement of the accused, and when it does appear that his absence was due to the negligence of the prosecution. A great authority on the "History of the Criminal Law of England" [3] has told us that "upon the whole it may be said that the criminal trials of the century preceding the civil war differed from those of our own day in the following important particu-

Trials must be speedy and public.

English criminal trials prior to civil war.

[1] 156 U. S. 237.
[2] 178 U. S. 458.
[3] Sir James Fitzjames Stephen, i, 350.

lars: (1) The prisoner was kept in confinement more or less secret till his trial, and could not prepare for his defense. He was examined and his examination was taken down. (2) He had no notice beforehand of the evidence against him, and was compelled to defend himself as well as he could when the evidence, written or oral, was produced on his trial. He had no counsel either before or at the trial. (3) At the trial there were no rules of evidence, as we understand the expression. The witnesses were not necessarily (to say the very least) confronted with the prisoner, nor were the originals of the documents required to be produced. (4) The confessions of accomplices were not only admitted against each other, but were regarded as specially cogent evidence. (5) It does not appear that the prisoner was allowed to call witnesses on his own behalf; but it matters little whether he was or not; as he had no means of ascertaining what evidence they would give, or of procuring their attendance."[1] In Scotland no witnesses were allowed for the prisoner until the eighteenth century, nor in France until the Revolution. After the accession of the House of Stuart England began to mitigate such barbarous practices, drawn in the main from Roman law, which refused to permit a party accused in a capital case to exculpate himself by the testimony of witnesses. Then it was that the House of Commons insisted, in a particular bill then pending, despite the opposition of the Crown and the Lords, upon affirming the right, in cases tried under that Act, of witnesses being sworn for, as well as against, the accused. By the statute of 7 and 8 Will. III, c. 3, the same rule was established in cases of treason and felony. By that statute as supplemented by 7 Anne, c. 27, s. 14, it was provided that a copy of the indictment against the prisoner charged with high treason should be delivered to him at least five days before the trial, and a copy of the panel of jurors two days before the trial; that he should be entitled to process to compel the attendance of witnesses to be examined on oath, and throughout the trial to the assistance of counsel.[2] Not until a later time was the right to be represented by counsel extended to all other cases. In Andersen *v.* Treat,[3] it was held that the

After accession of House of Stuart.

[1] Sir James Fitzjames Stephen, *History of the Criminal Law of England*, i, 351–354.

[2] See *The Origin and Growth of the Eng. Const.*, ii, 432–433.

[3] 172 U. S. 24.

Right of counsel to confer with prisoner.

refusal to permit counsel engaged by a prisoner to have a consultation with him before the district attorney had seen and examined him is not ground for attacking a conviction by *habeas corpus*, when the prisoner waived an examination before a commissioner, and was represented on the trial by counsel assigned to him at his own request, and the statement made by him to the district attorney was voluntary and was not put in evidence, and no objections were raised to questions asked him on the stand as to what he said on that occasion, and no witnesses were called to contradict his answers. When in the case of Callan *v.* Wilson,[1] the guarantee of an impartial jury trial was in question the Court said: "The enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and, so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all of the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several states." Special reference should be made here to the weighty words of Mr. Justice Brown, who, in construing in Mattox *v.* United States, heretofore cited, the provision that the accused shall "be confronted with the witnesses against him," said: "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject — such as his ancestors had inherited and defended since the days of Magna Carta."

Enumeration of rights of accused in Sixth Amendment.

Rule of interpretation.

Jury trials in civil cases guaranteed.

Article VII provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law." The outcry against the new Constitution for its failure to provide satisfactory guarantees of trial by jury in criminal cases — a defect

[1] 127 U. S. 540.

remedied by the Fifth and Sixth Articles — was repeated with even greater emphasis when it was ascertained that as to trial by jury in civil cases there was no guarantee at all. In the absence of such an assurance, deep suspicion was expressed on account of Article III, Sec. 2, Clause 2, which provides that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." We learn from "The Federalist" that the contention was made that by virtue of that "appellate" power the Supreme Court could set aside the decision made by a jury as to a question of fact. "Some well intentioned men in this state," says Hamilton, "deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favor of the civil-law mode of trial which prevails in our courts of admiralty, probate, and chancery. A technical sense has been affixed to the term 'appellate,' which, in our parlance, is commonly used in reference to appeals in the course of the civil law." [1] To quiet such apprehensions the article in question was adopted, which, after clearly excluding by implication suits in equity, expressly provides that all suits at common law, over a certain amount, shall be tried by jury, "and that no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law." In Elmore *v.* Grymes,[2] the Court held that the plaintiff had a right to have his cause submitted to a jury, after a peremptory nonsuit against his will had been ordered in the Circuit Court; and the same general doctrine was applied in Parsons *v.* Bedford,[3] and in Castle *v.* Bullard.[4] In Baylis *v.* Insurance Company [5] it was held that a court cannot substitute itself for a jury and pass upon the effect of the evidence and render judgment thereon, without an express waiver of the right of trial by jury. In McElrath *v.* United States [6] it was held that a suit against the Government could be tried in the Court of Claims without a jury, because such a suit is not one at common law within the

Hamilton in "The Federalist."

Right to have cause submitted.

[1] *The Federalist* (Ford ed.), no. lxxxii, pp. 546–547.
[2] 1 Pet. 469.
[3] 3 Pet. 433.
[4] 23 How. 172.
[5] 113 U. S. 316.
[6] 102 U. S. 426.

meaning of the Amendment; and such was the distinction drawn in Guthrie National Bank *v.* Guthrie.[1] When we consider how large the scope of the English judges has always been in expressing their views on the facts to the jury, and in directing verdicts according to their opinions, it is not strange that in the case of Allis *v.* United States,[2] a criminal case, it should have been held that the judge may express his opinion as to the weight of the evidence, and may recall the jury after deliberation for a time to ascertain their difficulties, and to make proper efforts to assist them in their conclusions. In the earlier case of Simmons *v.* United States,[3] the Court had said: "It is so well settled, by a long series of decisions of this Court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it well to assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination." It was however held in Hicks *v.* United States,[4] that the wise and humane provision of the law that "the person charged shall, at his own request, but not otherwise, be a competent witness," should not be defeated by hostile comments of the trial judge on the testimony of the accused; and in Allison *v.* United States,[5] a new trial was granted because the trial judge had attempted to charge the jury as to the weight to be attributed to the evidence given by the accused in his own behalf. But such conclusions are not in conflict with Randall *v.* B. & O. R. R. Co.,[6] wherein the general rule was laid down that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that a verdict, if returned, must be set aside, the court may direct a verdict for the defendant.

Opinion of judge as to weight of evidence.

Limit to hostile comments.

Excessive bail and fines prohibited.

Article VIII provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In order to restrain the King from the wanton or tyrannical imposition of amercements, — the pecuniary fines laid on those who had offended against the royal prerogative, — it was provided by the Great Charter

[1] 173 U. S. 528.
[2] 155 U. S. 123.
[3] 142 U. S. 155.
[4] 150 U. S. 442.
[5] 160 U. S. 203.
[6] 109 U. S. 478.

that the freeman shall only be amerced according to his fault, saving to him the means of maintenance; and in like manner the merchant, saving to him his merchandise; and also the villein, except he be the King's villein, saving to him his wainage. No amercements shall be assessed in any case but by the oaths of honest and lawful men of the neighborhood.[1] In the Bill of Rights it is provided "that excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." Thus it appears that the article in question is simply a copy of Article 10 of the Bill of Rights, which rests in part upon chapters 20, 21, 22 of the Great Charter. The Supreme Court has firmly resisted all attempts to construe it as a limitation upon the power of the states. The conclusion first announced in Pervear *v.* Massachusetts [2] was repeated in *Ex parte* Kemmler,[3] when the attempt was made to prevent electrocution as a cruel and unusual punishment. It was therein held that as the article in question was not designed to interfere with the power of the state to protect the lives, liberties, and property of its citizens, and to promote their health, peace, morals, education, and good order, a statute inflicting the punishment of death by electricity is within the legitimate sphere of state legislation.

Article 10 of Bill of Rights reproduced.

Electrocution not prohibited.

With this article ends that part of our national Bill of Rights which is drawn from the English system. Even a casual inspection of the material thus derived will convince any one familiar with the history of that system that, after excepting the due process of law clause derived from the Great Charter, nearly all of the remaining provisions are taken from the modern English Constitution as reformed and invigorated during the Revolutions of 1640 and 1688. In other words, that body of new constitutional law evolved in England between 1640 and 1776, first formulated in the bills of rights of the original state constitutions, finally reappeared in the first eight articles of amendment to the existing federal system. If anything in the history of any country is certain, it is that the essence of the English constitutional system as reformed by the Revolutions of 1640 and 1688, and as defined by Black-

Modern English Constitution as source.

[1] Chaps. 20, 21, 22. Upon the whole subject of amercements, see Reeves, *Hist of Eng. Law*, ii, 35–39.

[2] 5 Wall. 475.

[3] 136 U. S. 436.

stone in 1758, passed into our first state constitutions, which were the filter-beds through which the essence of the reformed system passed into the existing Constitution of the United States.

An act of over-caution.

Article IX provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In that provision over-caution reached its climax in a declaration made redundant by the eight preceding articles of amendment, each of which had proclaimed in substance the same thing. Or to put the matter in another form, Article IX is a brief and dogmatic answer to the contention that no bill of rights was necessary as a preface to a constitution creating a government of limited and enumerated powers. That contention, as stated by Hamilton, was this: "I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power."[1] Prior to that he had said: "But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a Constitution which has the regulation of every species of personal and private concerns." To such reasoning the counterblast of the over-cautious was that the maxim *expressio unius exclusio est alterius*, good enough in its proper place, might be improperly applied to the rights of the people in reference to the powers of government created by the new Constitution. As Story (sec. 453) has well expressed it: "This clause was manifestly introduced to prevent any perverse or ingenious misapprehension of the well known

Contention that bill of rights was unnecessary.

Maxim of *expressio unius*.

[1] *The Federalist* (Ford ed.), no. lxxxiv, pp. 573–574.

maxim, that an affirmation in particular cases implies a negation in all others; and *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of 'The Federalist' on the subject of a general bill of rights."

Reserved powers of the states.

Article X provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." As explained already, Pelatiah Webster, clearly foreseeing the difficulties certain to arise on that subject, embodied in his plan an expository statement so luminous, so comprehensive, that its adoption would have rendered entirely unnecessary both the ninth and tenth articles of amendment.[1] Without repeating that statement, heretofore quoted at length, suffice it to say that the argument that it is impossible to confine a government to the exercise of express powers, and that there must be powers necessarily implied, was met in Fairfax *v.* Hunter,[2] by the declaration that "the Government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." In McCulloch *v.* Maryland,[3] Marshall, C. J., exhausted the subject when he said: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the perplexity of a legal code, and could scarcely be embraced by the human mind. . . . The Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. . . . Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which

Marshall on implied powers.

[1] See above, p. 154 *sq.*

[2] 1 Wheat. 326.

[3] 4 Wheat. 316.

are plainly adapted to that end, which are not prohibited, but consist with the spirit and letter of the Constitution, are constitutional."

States protected against certain suits.

Article XI provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." That article, proposed to the legislatures of the several states by the Third Congress on March 5, 1794, was declared ratified by the legislatures of three fourths of the states in a message from the President to Congress dated January 8, 1798. Thus it appears that eight years intervened between the adoption of the first ten articles of amendment and the eleventh. During that interval the necessity for such an amendment was disclosed by the case of Chisholm *v.* Georgia[1] (1793), the third case entered on the "original docket" of the Supreme Court, an action of assumpsit, in which the following questions arose: "1. Can the State of Georgia, being one of the United States of America, be made a party defendant in any case in the Supreme Court of the United States, at the suit of a private citizen, even though he himself is, and his testator was, a citizen of the State of South Carolina? 2. If the State of Georgia can be made a party defendant in certain cases, does an action of assumpsit lie against her? 3. Is the service of the summons upon the Governor and Attorney-General of the State of Georgia a competent service? 4. By what process ought the appearance of the State of Georgia to be enforced?" After preliminary action in 1793, "in February term, 1794, judgment was rendered for the plaintiff, and a writ of inquiry awarded. The writ, however, was not sued out and executed, so that this cause, and all other suits against states, were swept at once from the records of the Court by the amendment to the Federal Constitution, agreeably to the unanimous determination of the judges in Hollingsworth *v.* Virginia, argued at February term, 1789." In that case the Court held "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any

Chisholm *v.* Georgia forced Article XI.

Hollingsworth *v.* Virginia.

[1] 2 Dall. 419.

foreign state."[1] With the insertion of the words "be construed to," not in the Amendment as originally proposed, it became possible to give to the Amendment such a retroactive effect as nullified the result announced in Chisholm *v.* Georgia. For a more extended view, see Cohens *v.* Virginia;[2] Bank of the U. S. *v.* Planters' Bank;[3] New Hampshire *v.* Louisiana and New York *v.* Louisiana;[4] *Re* Ayers.[5] The prohibitions of the article in question do not protect a state against a suit by another state, or, it would seem, against a suit by a foreign sovereign. Mr. Justice Curtis once said that "a foreign citizen or subject cannot sue a state; but a foreign sovereign, as, for instance, the Queen of England, may bring a suit against the State of Massachusetts, or any other state in the Union, in the Supreme Court of the United States."[6]

Suit by a foreign sovereign.

Article XII provides that "the electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist

Electoral system amended.

[1] 3 Dall. 382.
[2] 6 Wheat. 406.
[3] 12 Pet. 731.
[4] 108 U. S. 89.
[5] 123 U. S. 489.
[6] Cf. Curtis, *Jurisdiction of the United States Supreme Court* (Harvard Lectures, Merwin ed.), citing *Memoir, etc., of Judge Curtis*, i, 282.

of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States." That article, proposed to the legislatures of the several states by the Eighth Congress, on December 12, 1803, in lieu of the original third paragraph of the first section of the Second Article, was declared to have been ratified by the legislatures of three fourths of the states in a proclamation of the Secretary of State, dated September 25, 1804.

Menacing conditions arising out of election of 1800.

Thus it appears that nearly seven years intervened between the adoption of the Eleventh and Twelfth Articles of amendment. During that interval the necessity for the last-named was disclosed by the menacing condition of things arising out of the presidential election of 1800 in which Jefferson and Burr were voted for by the same political party, each receiving an equal number of electoral votes, — seventy-three against sixty-five for Adams, sixty-four for Pinckney, and twenty-one for Jay. Under the Constitution as it then stood, President and Vice-President could not be separately designated on electoral tickets. As party spirit had prompted seventy-three of the electors to vote for the same two men, these two were tied for the first place. There being no choice, the election went to the House of Representatives under the provision of the original Constitution declaring that when two persons have an equal vote, and each has a majority over all, the House should choose one of them as President. The House had a Federalist majority, but, by the equality of votes between Jefferson and

Election by the House.

Burr, it was forced constitutionally to choose between two Republicans. Under such conditions the fear was that there would be no election, and thus an *interregnum* which might disrupt the Union. Finally on the 26th ballot by states, five Federalists from South Carolina, four from Maryland, one from Vermont, and one from Delaware did not vote, thus enabling the Republican members from Vermont and Maryland to cast the votes of those states for Jefferson. In that way by the votes of ten states he was elected President, Burr becoming Vice-President. The result of that crisis was the article in question which directs each elector to vote for President and Vice-President as such.

Right to count electoral votes.

Into the Twelfth Amendment passed that clause of the original Constitution (Art. II, Sec. 1, Par. 3) which provides that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the [electoral] certificates, and the votes shall then be counted." When a conflict arose between Hayes and Tilden, the opposing presidential candidates in the election of 1876, a majority of the Senate was favorable to the former, a majority of the House was favorable to the latter. The friends of the former claimed that the power to count the votes was vested in the President of the Senate, the House and Senate being mere spectators. The friends of the latter contended that the President of the Senate could only act ministerially; that the presence of the two Houses made them the controlling supervisors of his acts; that the real power to count the votes was vested in the two Houses acting concurrently. That manifestly sound view was strengthened by the history of the previous conduct of the two Houses in 1793, 1797, and 1800, when the President of the Senate had simply exercised the ministerial function of opening the certificates and laying them before the two Houses. The friends of the latter also insisted that Congress should continue the practice followed since 1865, which was that no vote objected to should be counted except by the concurrence of both Houses. As the House was strongly Democratic, the throwing-out of the vote of one state meant the election of Tilden. In the presence of such a crisis Congress, in order to break the deadlock by a compromise, passed "The Electoral Commission Act," under which the disputed electoral certificates were considered and de-

Precedents of 1793, 1797, and 1800.

Electoral Commission Act, Jan. 29, 1877.

cided upon by the Electoral Commission, subject to be set aside by the concurrent vote of the two Houses. While the constitutionality of the Act was gravely doubted, it served the purpose for which it was intended. The Commission created by it rescued the country from a real peril by a party vote of eight to seven in favor of Hayes. As a concurrent vote of the two Houses could never be obtained, the decisions of the abnormal tribunal as to the disputed certificates remained unreversed. In the hope of preventing the intervention of such a tribunal in the future, the Electoral Count Act was approved February 3, 1887, which provides that the President of the Senate shall open the electoral certificates in the presence of both Houses, and hand them to the tellers, two from each House, who are to read them aloud and record the votes, — the purpose being to throw upon each state, so far as possible, the responsibility of determining how its own presidential vote has been cast. The effect of that Act, when considered in connection with the Electoral Commission Act, should be to annihilate the monstrous claim that the President of the Senate is vested with the power to count the electoral vote with the two Houses standing by as impotent spectators. The ultimate power is certainly vested in the two Houses acting concurrently; as supervisors of the ministerial acts of the President of the Senate, they are the guardians of the count and the arbiters of the final result.[1]

Electoral Count Act, February 3, 1887.

Survivors at end of constructive period.

With the ratification of the Twelfth Amendment the constructive work of the founders of the Republic drew to a close. By that time Washington, Pelatiah Webster, Franklin, Hamilton, John Rutledge, James Wilson, George Mason, Roger Sherman, John Blair, and Robert Yates had passed away; while Jefferson, John Adams, Madison, Marshall, Charles Pinckney, Oliver Ellsworth, Elbridge Gerry, Rufus King, Edmund Randolph, Robert Morris, Gouverneur Morris, John Langdon, George Wythe, and Richard Dobbs Spaight still remained. Not one of that number, however, survived the sixty-one years destined to pass by before the ratification of the Thirteenth Article of Amendment on December 18, 1865. It is hard to pass from this constructive epoch whose close is marked by the ratification of the Twelfth Amendment without a word as to the

[1] For the best statement of the subject as a whole, see Johnston, *American Political History*, part ii, pp. 508–555.

tragic fate of one whose brilliant and useful life was cut short by a deadly spirit of revenge, the outcome no doubt of the bitterness and disappointment incident to the political contest in which the Amendment was born. After the struggle for the Presidency between Jefferson and Burr had passed into the House of Representatives, Hamilton, let it be said to his honor, earnestly opposed those Federalists who resolved to eliminate the abler Jefferson by casting their votes for Burr. Finally, by the withdrawal of Federalist votes, the battle was lost to Burr. The flame thus lighted burned afresh when, through the efforts of Hamilton, Burr was defeated in 1804 as a candidate for the office of Governor of New York. Then it was that he sought and found an excuse for the quarrel which resulted in the duel in which Hamilton fell on July 11, 1804, a little more than two months before the Twelfth Amendment became a part of the fundamental law. The subsequent trial of Burr for treason in 1807, before Marshall, Chief Justice, and Griffin, District Judge, in the Circuit Court of the United States at Richmond, when taken in connection with the case of Bollman and Swartwout, growing out of the Burr conspiracy, gave rise to opinions delivered by the Supreme Court, and by Marshall, C. J., sitting apart from it in the Circuit Court, that constitute the foundation, in fact almost the entire body of the American law of treason.[1] In order to abolish the law of constructive treason[2] as it existed in England, the Constitution (Art. III, Sec. 3) provides that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." After prolonged argument in Burr's case by a brilliant array of counsel, the Chief Justice delivered his opinion on August 31, the primary purpose of which was to demonstrate that only those who had done some act or taken some part in the accomplishment of the overt act of treason charged in the indictment were guilty of the crime as defined in the Constitution. Certain acts

Hamilton.

Trial of Burr for treason.

Constructive treason abolished.

[1] For an excellent presentation of "the American law of treason," with the text of the cases referred to, see Dillon's *Marshall's Complete Constitutional Decisions, Annotated*, 51–165.

[2] Cf. Taylor, *The Origin and Growth of the Eng. Const.*, i, 582.

which were supposed to amount to treason having been proved, evidence was offered for the purpose of connecting Colonel Burr with those who committed these acts, he having been at a great distance from the scene of action, in another federal district and state. Nothing could more vividly illustrate the oneness of English and American constitutional law than the following paragraph in which the great Chief Justice defined the meaning, in both systems, of the term "levying war." He said: "But the term is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is therefore reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England and in this country to have been used in the statute of twenty-fifth of Edward III, from which it was borrowed." [1]

Oneness of English and American constitutional law.

[1] U. S. *v.* Burr, 4 Cranch, 470.

# CHAPTER IX

## AFRICAN SLAVERY AND ITS CONSEQUENCES

THE deadly original sin of this Republic was African slavery, which had crept into all the colonies prior to the Revolution. Finally in 1789 the North and the South covenanted together in what are known as the "compromises of the Constitution" to perpetuate it by law forever. After that fateful compact had been signed a great moral revolt took place in the conscience of the world which ultimately destroyed the institution in this country at the end of a prolonged civil war which, for a time, disrupted the Union, in fact if not in law. The driving force of that great moral revolt manifested itself in no uncertain terms in England when Lord Mansfield, in Sommersett's case,[1] held that a person forcibly detained in England as a slave, is entitled to be discharged on *habeas corpus*. The essence of the reasoning by which that conclusion was reached was this: "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from which it was created are erased from memory. It is so odious that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged." As will be pointed out hereafter, the failure, in the celebrated case of Dred Scott,[2] — wherein a person, having the *status* of a slave in a state where slavery was legal, was taken by his master into a free state of the Union in which slavery was prohibited by law, — of the attempt in this country to enforce the principle thus announced by Lord Mansfield, precipitated the civil war.

Slavery in all the colonies prior to the Revolution.

Mansfield in Sommersett's case.

Case of Dred Scott.

[1] 20 St. Tr. *sq.*, 12 Geo. III. A. D. 1771–72. Broom's *Constitutional Law*, 59, 99.

[2] Scott *v.* Sandford, 19 How. 393. See also the Slave Grace, 2 Hagg. Adm. R. 94, adjudged by Lord Stowell; The Antelope, 10 Med. 66; Osborn *v.* Nicholson, 13 Wallace, 654.

Slaves landed by Dutch at Jamestown, 1619.

Negro slavery, which originated in Africa, spreading to Spain before the discovery of America, and to America soon after, made its appearance on this continent the year before the Mayflower brought the Pilgrims to Plymouth Rock, when a Dutch ship landed twenty African slaves at Jamestown. In 1626 the Dutch West India Company began to import slaves into Manhattan, and by 1637 there were slaves in New England. A Royal African Company with the Duke of York, afterwards James II, as its president, was formed to monopolize the slave trade, which monarchs and ministries furthered to the utmost of their power. Despite the fact that the Crown forced the institution upon Virginia, that great commonwealth had, prior to 1700, a smaller proportion of slave population than some of the Northern colonies. While before the Revolution all the colonies held negro slaves, at the close of the eighteenth century there was a strong anti-slavery feeling even in Virginia and North Carolina. Only in South Carolina and Georgia was slavery then looked upon with favor, owing no doubt to the fact that those states were mostly given to the cultivation of rice and indigo, which seemed to make slave labor indispensable. A sudden transformation took place, however, in 1793, when Whitney, a Connecticut schoolmaster living in Georgia, invented the cotton-gin, whereby a slave, who by the old process could clean but five or six pounds of cotton a day, was enabled to clean a thousand pounds a day. Under such a stimulus, slavery at once ceased to be a passive and innocuous institution. The first battle in the seventy years' war over slavery was fought in the Federal Convention of 1787, and the outcome was registered in three of the important compromises of the Constitution. By the first it was agreed that "the migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." [1] By the second it was agreed that "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined

Cotton-gin, 1793.

Three compromises of the Constitution.

[1] Art. 1, Sec. 9.

by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons."[1] By the third it was agreed that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."[2]

Ordinance of 1787.

While the Federal Convention was entering into these solemn compacts regarding the institution of slavery at Philadelphia, the Continental Congress, then sitting at New York, was completing its last and perhaps its greatest work, — the Ordinance of 1787 for the organization and government of the vast area known as the Northwest Territory. A brief account has been given heretofore of the determined stand taken by Delaware, New Jersey, and Maryland, and finally by Maryland alone, whereby the title to that vast domain of which France had been dispossessed "by the blood and treasure of the thirteen states," was vested in the person of the new nationality, to be held by it under the Articles of Confederation as folkland for the common benefit of all. Nor until Maryland had received satisfactory assurances on that subject from certain of the larger states, did she agree, on March 1, 1781, to complete the first Constitution by giving it her adhesion. Exactly three years thereafter, Virginia, the most important claimant, executed a deed conveying unconditionally, and in due time Massachusetts and Connecticut did the same thing.[3] The Six Nations by a treaty made in 1784 renounced all claims to the country west of the Ohio; in January, 1785, the Wyandotte, Delaware, Chippewa, and Ottawa nations released the country east of the Cuyahoga, and all the lands on the Ohio, south of the line of portages from that river to the Great Miami and the Maumee; in January, 1786, the Shawnees concluded a treaty in which they acknowledged the sovereignty of the United States over all their territory as described in the treaty of peace with Great Britain, and renounced for themselves all claim to property in any lands east of the main branch of the Great Miami.[4] With the extinguishment of the claims of the ceding

Title to Northwest Territory.

[1] Art. I, Sec. 2, Clause 3.
[2] Art. IV, Sec. 2, Clause 3.
[3] See above, p. 134.
[4] U. S. Statutes at Large, vii, 15, 16–18, 26.

states and the Indian titles to Southern Ohio, and all Ohio to the east of the Cuyahoga, the Confederation became the owner of the Northwest Territory, — the area out of which were carved the great states of Michigan, Wisconsin, Illinois, Indiana, and Ohio, — excepting the Connecticut Reserve.

All territorial lands declared national domain, 1780.

In the absence of the power to tax, the Confederation found in the public lands under its control the only fund really its own. In order to make that fund available the Continental Congress, as early as September, 1780, passed a resolution declaring that all territorial lands should be national domain, to be disposed of for the common benefit of the states, with privilege of its growing into states as equals with the original thirteen. To that resolution can be traced the exercise of national sovereignty in the sense of eminent domain. So soon as Virginia — who conquered the Northwest during the Revolution through the genius and valor of George Rogers Clark and his men — relinquished unconditionally her claim by the deed of March 1, 1784, it became necessary for Congress to provide for the government of a domain into which settlers were then eager to enter. In the very month in which that deed was made, Rufus Putnam — who had in the preceding year promoted a petition to Congress of officers and soldiers of the Revolution for leave to plant a colony of veterans between Lake Erie and the Ohio, in townships of six miles square, with large reservations "for the ministry and schools" [1] — appealed to Washington with the assertion that "you are sensible of the necessity as well as the possibility of both officers and soldiers fixing themselves in business somewhere as soon as possible; many of them are unable to lie long on their oars." Under these circumstances Jefferson, as chairman of a committee composed of Chase, Howell, and himself, on April 19, 1784, reported to Congress a plan for a temporary government of the territory in which was this article: "That, after the year 1800, there shall be neither slavery, nor involuntary servitude in any of the said states, otherwise than in punishment of crimes, whereof the party shall have been convicted." After Mr. Spaight had moved to strike out that paragraph, "it was struck out — the three Southern States present voting for the

Rufus Putnam.

Temporary government reported by Jefferson, 1784.

[1] S. P. Hildreth, *Pioneer Settlers of Ohio*, 88. Walker, 29. Letter of Rufus Putnam, 16th June, 1783. Bancroft, ii, 105–106.

striking out, because the clause did not then contain the provision in favor of the recovery of fugitive slaves, which was afterwards ingrafted upon it. "Mr. Webster says the ordinance reported by Mr. Jefferson in 1784 did not pass into law. This is a mistake again. It did pass; and that within five days after the anti-slavery clause was struck out — and that without any attempt to renew that clause, although the competent number (seven) of non-slaveholding states were present — the colleague of Mr. Dick having joined him, and constituted the presence of New Jersey." [1] In March, 1785, the subject was revived, without a definite result, by King of Massachusetts, who proposed the rejected anti-slavery article as originally offered by Jefferson, with this addition: "And that this regulation shall be an article of compact, and remain a fundamental principle of the constitutions between the thirteen original states, and each of the states described in the resolve." Thus the matter stood when the Eighth Congress found itself with a quorum in February, 1787. To that Congress Virginia sent Madison, Richard Henry Lee, Edward Carrington, and William Grayson, always opposed to slavery, who was chosen presiding officer. As the necessity of providing a territorial government was more than ever urgent, the report on that subject, which was to have had its third reading on May 10, was, on July 9, referred to a new committee [2] composed of Edward Carrington, Nathan Dane, Richard Henry Lee, Kean of South Carolina, and Melancthon Smith of New York, who worked so diligently that on July 11 their report of an ordinance for the government of the Northwest Territory, embodying the best parts of the work of their predecessors, was ready for its first reading. But from the draft contained in that report, — which provided that the whole territory was to be divided into three states only; that the waters leading into the Mississippi and St. Lawrence, and the carrying-places between them, should be made common highways and free forever; that the

Jefferson's proposal revived by King in 1785.

Report by new committee, July 11, 1787.

[1] Benton's *Thirty Years' View*, i, 133–136, where records of Congress are critically examined and the facts as to Jefferson's authorship put beyond question.

[2] Mention is made in the *Journals of Congress*, iv, 751, for July 11, that the report of a committee touching the temporary government of the western territory had been referred to the committee; and an indorsement in the Department of State indicates that that reference was made July 9.

utmost good faith should be enjoined towards the Indians; that schools and the means of education should forever be encouraged; that irrepealable articles of compact guaranteeing the freedom of religious worship and other rights usually contained in bills of rights should be established, — the subject of slavery was omitted altogether. With that grave omission the ordinance received its first reading and was ordered to be printed. As the subsequent proceedings have been the subject of sectional controversy, the author is content to rest the matter upon the statement of Bancroft, who says: "Obeying an intimation from the South, Nathan Dane copied from Jefferson the prohibition of involuntary servitude in the territory, and quieted alarm by adding from the report of King a clause for the delivering up of the fugitive slave. This at the second reading of the ordinance he moved as a sixth article of compact, and on the thirteenth of July, 1787, the great statute forbidding slavery to cross the river Ohio, was passed by the vote of Georgia, South Carolina, North Carolina, Virginia, Delaware, New Jersey, New York, and Massachusetts, all the States that were then present in Congress. . . . Thomas Jefferson first summoned Congress to prohibit slavery in all the territory of the United States; Rufus King lifted up the measure when it lay almost lifeless on the ground, and suggested the immediate instead of the prospective prohibition; a Congress composed of five Southern States to one from New England, and two from the Middle States, headed by William Grayson, supported by Richard Henry Lee, and using Nathan Dane as scribe, carried the measure to the goal in the amended form in which King had caused it to be referred to a committee; and, as Jefferson had proposed, placed it under the sanction of an irrevocable compact." [1] But here let it be remembered that this celebrated ordinance — into which six articles were inserted to be considered as compacts between the original thirteen states and the people of said territory, to remain forever unalterable, unless by common consent — provided in the fifth article for forming from said territory not less than three nor more than five states, the boundaries of which were to be fixed by the articles "as soon as Virginia shall alter her act of cession to consent to the same." The fifth article also provided that

Bancroft's statement.

Reference in fifth article to consent of Virginia.

[1] Bancroft, ii, 115–116.

any of said states might form a permanent constitution and state government, provided the same were republican, and "conformed to the principles contained in said articles," one of which, the sixth, forbade slavery in said territory. The distinct consent of Virginia, as the grantor in the deed of 1784 to this territory, thus became necessary not only to the proposed change of boundary, but also to the clause prohibiting slavery. That consent was given by the legislature of Virginia, December 30, 1788, in such a form as to ratify and confirm both the fifth and sixth articles of the compact for the admission of such new states, when their government and constitution should be republican and in conformity to the principles contained in the articles in question. As an eminent Virginia jurist has expressed it: "This transaction not only estops the other states to deny the exclusive and paramount title of Virginia, but estops all others and Virginia to deny that by her own sovereign act as owner of the territory she consented that it should be free territory forever thereafter. It will be found from the learned opinion of Chief-Justice Taney in Dred Scott *v.* Sandford, concurred in by Justices Wayne, Grier, Daniel, Campbell, and Catron, in all six judges out of nine, that these historical views are fully sustained, though it does not bring out the point, so necessary, of Virginia's consent to the prohibition clause of the articles, and of her unqualified consent to it as a condition of the change proposed. The act was not an act of Congress under the Articles of Confederation, but an act of the several states, Virginia consenting to the establishment of this ordinance." [1]

Tucker's summing up.

The text of the famous Ordinance of July 13, 1787, entitled "An Ordinance for the government of the territory of the United States northwest of the river Ohio," which is so great a factor in our constitutional history, is here reproduced: —

Text of the famous Ordinance of July 13, 1787.

SECTION 1. *Be it ordained by the United States in Congress assembled*, That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

SEC. 2. *Be it ordained by the authority aforesaid*, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a

[1] J. R. Tucker, *The Constitution*, ii, 604.

deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

SEC. 3. *Be it ordained by the authority aforesaid*, That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; and he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

SEC. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

SEC. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the

district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

SEC. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

SEC. 7. Previous to the organization of the general assembly, the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized, the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

SEC. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

SEC. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *Provided*, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided also*, That a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

SEC. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

SEC. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, resident in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

SEC. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

SEC. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of states, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest:

SEC. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of com-

pact, between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE I

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.

ARTICLE II

The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.

ARTICLE III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ARTICLE IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them

by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new states, as in the original states, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new states, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona-fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying-places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the Confederacy, without any tax, impost, or duty therefor.

## ARTICLE V

There shall be formed in the said territory not less than three nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western state, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle state shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern state shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* And it is further understood and declared, that the boundaries of these three states shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the Confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.

ARTICLE VI

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always*, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

*Be it ordained by the authority aforesaid*, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.[1]

Colonists and constitution of mother state.

It is impossible to consider the terms of the foregoing enactment which laid the foundation of our colonial system without being impressed with the fact that its draftsmen, in obedience to a principle universal in the ancient and modern world,[2] excluded the colonists from all right to participate in the constitution of the mother state, save so far as particular provisions of it might be extended to them as a matter of grace and not as a matter of right. Really the only connection between the colonial government of the Northwest and the legislature of the parent state was through "a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting." The rank heresy of a later time, that "the Constitution follows the flag," finds nothing but refutation in the terms of the acts through which our early colonial systems were organized. The fundamental principle upon which all of them rests is that the Constitution is the exclusive possession of the fully organized states. That fact was emphasized with peculiar force in the case of American Ins. Co. *v.* Canter,[3] in which it was held that a territorial court whose judges hold their offices for four years cannot be a court of the United States

[1] Wallace *v.* Parker, 6 Pet. 680; Jones *v.* Van Zandt, 5 How. 215; Strader et al. *v.* Graham, 10 How. 82; Pennsylvania *v.* Wheeling Bridge Company, 18 How. 421; Bates *v.* Brown, 5 Wall. 710; Messenger *v.* Mason, 10 Wall. 507; Clinton et al. *v.* Englebrecht, 13 Wall. 434; Langdean *v.* Hanes, 21 Wall. 521; Morton *v.* Nebraska, 21 Wall. 660.

[2] See the author's article on that subject, entitled "Is Colonization a Crime." *The North American Review*, October, 1906.

[3] 1 Pet. 511.

within the meaning of the Constitution, because that provides that the judges shall hold their offices during good behavior. As Marshall, C. J., has expressed it: "We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares that 'the judges both of the supreme and inferior courts shall hold their offices during good behavior.' The judges of the superior courts of Florida hold their offices for four years. The courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." In a word, the colonies or territories of the United States are governed, as all other colonies in the world's history have been governed, by the parent state, without the right to participate in its Constitution. The whole subject has been most exhaustively reviewed by the Supreme Court in what are known as the Insular Tariff Cases (1900).[1] In the case of Downes *v.* Bidwell, it was expressly held that incorporation into the United States of territory acquired by treaty or cession, in which there are conditions against the incorporation of the territory until Congress provides therefor, will not take place until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family. Until the fiat is given by Congress, no territory can pass from a colonial or territorial condition into that full statehood which alone confers the right to participate in the national Constitution. However, there are certain provisions of the Constitution applicable to all territory governed by Congress, whether incorporated into the United States or not, because only subject to the limitations they contain can Congress act at all. In the words of the Court: "It does not follow that in the mean time, awaiting the decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary

Marshall explains the relation.

Insular Tariff Cases, 1900.

Certain constitutional provisions applicable to all territory.

[1] 182 U. S. 1–391.

control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property." [1]

Restricted right of suffrage;

It must also be observed that the charter of our first colony conferred the right of suffrage with this serious limitation: "Provided also, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being a resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative." At the time of the severance of the colonies from the mother country the total number of electors in the British Isles was only about 400,000, a condition of things that continued down to the Reform Bill of 1832.[2] The English idea that the right to vote was the privilege of the property-holding few became the rule in the constitutions of the older states, and from them it passed into our first territorial possessions. In making the second Constitution the states reserved to themselves very jealously the right to regulate the suffrage. The National House of Representatives is based upon population, but when its members are to be chosen, "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." If a state does not violate the rule of the Fifteenth Amendment as to "race, color, or previous condition of servitude," it may vest the election of the most numerous branch of its legislature in a little oligarchy, qualified, if it so pleases, by a very high property or other exacting qualification. Manhood suffrage in this country rests upon no guarantee that the states may not at any time set aside.

right of a state to regulate it.

Death of the old Congress.

At the moment the old Congress was completing at New York this great compact involving the future of slavery, the Convention at Philadelphia was in the midst of the death-grapple between the larger and smaller states as to the organization of the two branches of the new federal legislature. From that time onward the mildly sovereign body of the Confederation, having now performed its last and by far its most notable legislative act, began to dwindle in public interest.

[1] Citing Yick Wo *v.* Hopkins, 118 U. S. 356; Fong Yue Ting *v.* United States, 149 U.S. 698, and other cases.

[2] See *The Origin and Growth of the English Constitution*, ii, 531.

It really performed its last important function when, after the reading, on September 28, of the report from the Federal Convention, it transmitted the result of its labors to the several state executives, to be by them submitted "to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature for their assent and ratification."[1] Madison, after completing his labors at Philadelphia, resumed his seat in Congress on October 8; and when he was joined for a time by Alexander Hamilton on February 23, 1788, they were the only men of note in the body. After lingering through the summer, it passed its last act on October 10. Only two members attended on November 3. From that time onward "a few members would have their names recorded as present each day. On March 2 (1789), Philip Pell of New York attended alone, and the Congress was dead. It was never adjourned, and had no formal dissolution. The faithful secretary, Charles Thompson, wrote the last entry in the Journal, and he and the forgotten Mr. Pell were the sole spectators of the end. People had forgotten that the Congress still lingered, for attention was concentrated upon the new Congress called to meet March 4th."[2] And here it should be said that before the old order of things passed away "the Ohio Company" — whose organization began in January, 1786, with the invitation published by Putnam and Tupper in the newspapers of Massachusetts to all who desired to unite for purchasing and colonizing a large area between the Ohio and Lake Erie — was prepared at a meeting of subscribers held on March 8, 1787, at Boston, to elect Parsons, Putnam, and Cutler directors, in order that they might draft a memorial[3] to Congress for a purchase of lands adequate to the wants of the undertaking. With matters thus arranged beforehand, the agents of the Ohio Company, so soon as the Ordinance of 1787 was passed, rapidly settled the terms of a sale with the United States, substantially on the basis of the report of Carrington.[4]

Passed its last act October 10, 1788.

The Ohio Company.

[1] *Journals of Congress*, iv, 782.

[2] Gaillard Hunt, *Life of Madison*, p. 168.

[3] The memorial, in the handwriting of Parsons, is indorsed, "Memorial of Samuel H. Parsons, agent of the associators for the purchase of lands on the Ohio. Read May ninth, 1787. Referred to Mr. Carrington, Mr. King, Mr. Dane, Mr. Madison, Mr. Benson. Acted on July 23, 1787. See committee book." Vol. xli, *Papers of the Old Congress*; vol. viii, 226, of the *Memorials*.

[4] Cf. *Journals of Congress*, iv, Appendix 17.

Old soldiers of the best character whom the war had impoverished were ready to go at once. "No colony in America," said Washington, "was ever settled under such favorable circumstances as that which has just commenced at Muskingum. Information, property, and strength will be its characteristics." [1] In its petition the Ohio Company asked for nothing better than that its settlers should be "under the immediate government of Congress in such mode and for such time as Congress shall judge proper."

Webster's tribute.

In a notable speech delivered in 1829, Daniel Webster said: "At the foundation of the constitution of these new northwestern states, we are accustomed, sir, to praise the lawgivers of antiquity; we help to perpetuate the fame of Solon and Lycurgus; but I doubt whether one single law of any lawgiver, ancient or modern, has produced effects of more distinct, marked, and lasting character than the Ordinance of 1787." [2]

Madison's criticism.

While Madison warmly commended the Act, he said that Congress did it "without the least color of constitutional authority," — as the Articles of Confederation contemplated no occasion for such an assertion of sovereignty, and as the Ordinance was never submitted to the states for ratification. "A great and independent fund of revenue," said Madison, "is passing into the hands of a single body of men, who can raise troops to an indefinite number, and appropriate money for their support for an indefinite period of time." Apart from the soundness or unsoundness of such views, these uncontrovertible facts stand out as the most remarkable in our constitutional history. The greatest of the slaveholding states really won the Northwest from Great Britain during the war of the Revolution; when she ceded it on March 1, 1784, "Virginia gave up a magnificent and princely territory of which she was actually in possession." Instantly her leading statesman in Congress, Jefferson, proposed a form of territorial government to be based on the stipulation "that, after the year 1800, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes, whereof the party shall have been convicted"; in 1787 the Ordinance was passed with that stipulation as its corner-stone, the same having

Virginia's noble part.

[1] Sparks, ix, 385.
[2] See Benton's *Thirty Years' View*, i, 134.

been put into it by amendment, after the first reading, at the suggestion of the Southern States, which voted for it unanimously. As Pennsylvania and three states of New England were absent, the passsage of the Ordinance without the votes of the Southern States was an impossibility.[1]

The Northwest dedicated by the South to freedom.

How can the fact be explained that the slaveholding South thus deliberately dedicated to the cause of freedom the vast domain out of which five great states were to arise? What was the influence that induced Virginia, after dedicating this princely heritage to the new nationality, to propose that her own citizens should not be permitted to settle within its limits if they took their slaves with them? The answer, and the only one, has been given by a clear-visioned and unsectional Northern historian. John Fiske[2] hit the mark when he said: "It was not the nomenclature that stood in the way of Jefferson's scheme, but the wholesale way in which he tried to deal with the slavery question. He wished to hem in the probable extension of slavery by an impassable barrier, and accordingly he not only provided that it should be extinguished in the Northwestern Territory after the year 1800, but at the same time his anti-slavery ardor led him to try to extend the national domain southward. He did his best to persuade the legislature of Virginia to crown its work by giving up Kentucky to the United States, and he urged that North Carolina and Georgia should also cede their western territories. As for South Carolina, she was shut in between the two neighboring states, in such wise that her western claims were vague and barren. Jefferson would thus have drawn a north-and-south line from Lake Erie down to the Spanish border of the Floridas, and west of this line he would have had all negro slavery end with the eighteenth century.[3] The policy of restricting slavery, so as to let it die a natural death within a narrowly confined area, — the policy to sustain which Mr. Lincoln was elected President, in 1860, — was thus first

Jefferson's plan for the extinction of slavery.

[1] Such is Bancroft's testimony, ii, 112, 115–116.

[2] *The Critical Period*, 198.

[3] "The passage relating to the slave trade was stricken out from the original draft of the Declaration of Independence, as Jefferson testified, not only because of 'deference to Southern delegates,' but 'because our Northern brethren, being considerable carriers of slaves to others, were a little sensitive on that point.' — Ed." Johnston, *Am. Pol. Hist.*, p. 45, note 1. (Woodburn ed.)

definitely outlined by Jefferson in 1784. It was the policy of forbidding slavery in the national territory. Had this policy succeeded then, it would have been an ounce of prevention worth many a pound of cure. But it failed because of its largeness, because it had too many elements to deal with."

It failed because of its largeness.

Its first effort, however, was completely successful. Jefferson — supported by the strong anti-slavery feeling existing in Virginia and North Carolina at the close of the eighteenth century — was able, with the help of such men as George Mason, Grayson, and Chancellor Wythe (who emancipated his slaves towards the close of his life), to induce the South to dedicate the Northwestern Territory to freedom. But after the line was once drawn, after the Union was once divided into two great areas, — the one dedicated to slavery, the other to freedom, — the irrepressible conflict became inevitable. Out of that condition of things grew up a contest between the free and the slave states for control of the Government, the South wishing to extend the area of slavery by the admission of new slave states, the North seeking to confine the institution to the localities in which it already existed, while the Abolitionists of the North wished to extinguish it altogether.

The irrepressible conflict.

From the time "the compromises" were entered into in the Federal Convention of 1787, the opposing forces rested on their arms under a rule which admitted a slave state and a free state by turns, so as to preserve the balance of power in Congress as the new Constitution had fixed it at the outset. The first impulse of the Convention was to admit only those new states "lawfully arising within the limits of the United States," with the consent of two thirds of each House of Congress. Gouverneur Morris widened that idea, however, when he proposed that "new states may be admitted by the legislature into the Union," with the clear understanding that a majority vote might introduce foreign territory as a state into the Union. But when Maryland moved to grant unlimited legislative power to dismember old states, she was supported only by Delaware and New Jersey. In order to remove from Vermont the necessity of applying to New York for consent to enter the Union, for the reason that she had once been included within her "limits," that word was supplanted by the word

A slave state and a free admitted by turns.

Introduction of foreign territory.

"jurisdiction," which obviated the difficulty.[1] Thus the way was opened for the entry of the first new state, Vermont, in 1791.

The first census, 1790: freemen and slaves.

From the first census, taken the year before, we learn that the population of the United States was 3,929,326, in which were included 697,681 slaves. Of that total, Virginia possessed 292,627. Next came South Carolina, closely followed by Maryland and North Carolina.[2] As originally established in the colonies, slavery everywhere existed by custom and not by law. The state statutes subsequently passed on the subject simply regulated a preëxisting relation. While the slaves had come as chattels, and not as persons having a standing in law, which fastened the condition upon their children, their status was not defined in such abject terms by the new Constitution. In it slaves were described as "persons held to service or labor, under the laws of any state." They were thus recognized as persons from whom the positive laws of some of the states withheld personal rights for the time being. In response to that feeling, most of the Northern States were already on the way toward the abolition of slavery. Vermont never permitted it. Massachusetts had eliminated it by a judicial decree that held it was in conflict with her new constitution of 1780. While other states north of Virginia finally abolished it, it was done so gradually that in 1860 a last remnant survived in the form of eighteen apprentices for life in New Jersey. Moving in harmony with the Wilberforce propaganda against the slave trade, the Constitution had fixed 1808 as the certain limit of its life; and by 1804 all of the states had passed laws forbidding the importation of slaves from abroad. When South Carolina repealed such an act, Congress, in 1804, would have imposed the ten dollars tax at once, but for assurances that in due time the prohibiting act would be renewed.

"Persons held to service or labor."

Gradual abolition of slavery in the North.

Admission of Vermont, 1791.

Such were the general conditions existing at or about the time of the admission of Vermont, — "the New Hampshire

[1] *Madison Papers*, ii, 794, 861, 903, 1224, 1240; iii, 1456, 1458, 1462, 1558, 1589, 1620.

[2] See *A Century of Population Growth in the United States, 1790–1900*, p. 47. There it is stated that "an examination of the original manuscript returns shows that there never were any slaves in Vermont. The original error occurred in preparing the results for publication, when 16 persons, returned as 'free colored,' were classified as 'slave.'"

grants," — territory which both New Hampshire and New York had claimed. While the admission of Vermont was being discussed in the old Congress in 1782, Madison said that the opposition to it which came from Virginia, North Carolina, South Carolina, and Georgia was based on these grounds: "1st. An habitual jealousy of a predominance of Eastern interest. 2nd. The opposition expected from Vermont to Western claims. 3rd. The inexpediency of admitting so unimportant a state to an equal vote in deciding on peace, and all the other grand interests of the Union now depending. 4th. The influence of the example on a premature dismemberment of the other states." [1] Such considerations, potent in their influence on the politics of the old Congress, were now overruled; and Vermont, the only state that had never permitted slavery, a state sovereign and independent during the Revolution, was admitted in 1791, as such, and not as formed out of any other state. Thus a precedent was made for the admission at a later time of Texas, which had established its independence, and was admitted into the Union, despite the fact that it was not carved out of the territory of any state belonging thereto. As large areas of foreign territory were to be purchased, it was important to settle the fact that independent commonwealths existing or built up thereon could be admitted into the Union as states. The yoke-fellow of Vermont was Kentucky, admitted in 1792, with a slave population estimated in 1790 at 12,430, out of a total of 73,677. To the jurist the admission of Kentucky is of special interest because of the compact entered into between Virginia and Kentucky, which provided that all private rights and interests in lands within Kentucky, derived from the laws of Virginia prior to the separation, should remain "valid and secure" under the laws of Kentucky, and should be determined by the laws existing on December 18, 1789, in Virginia. Thus by compact, authorized by Article 1, Section 10, Clause 3, of the Constitution, a mother state has been able to perpetuate a part of her code of land law in a younger state formed from her domain.[2] The admission of Tennessee in 1796 was counterbalanced by the admission of Ohio in 1803, — the

Precedent for admission of Texas.

Kentucky admitted in 1792.

Tennessee, 1796, Ohio, 1803.

[1] *Madison Papers*, i, 123.

[2] The author is now engaged in a case in the Supreme Court of the United States, in which the construction of that compact is an important factor.

former being carved from the slave soil of North Carolina, the latter from the free soil of the Northwest Territory, which thus contributed its first state.

Louisiana Purchase, 1803.

During the ten years that were to intervene before another state was admitted, the famous Louisiana Purchase, made by Jefferson from Napoleon in 1803, doubled the national domain by an addition of 1,124,685 square miles, and secured to us the free navigation of the Mississippi, which French and Spanish intrigue had demonstrated as essential to the retention of the permanent loyalty of the West. From the end of the Revolutionary War down to about 1825, the danger of European aggression was a serious factor in the politics of this country. Out of that danger grew the famous Monroe Doctrine, designed to protect us as far as possible from such complications.[1] Constitutional lawyers of to-day do not consider seriously Jefferson's mental difficulty as to the right of this government to acquire new territory and to carve new states out of the same. In seizing a great opportunity, which gave us a real place in the family of nations, he did well to ignore a doubt that should never have existed.[2] The purchase was a brilliant act of diplomacy. "The news of the transfer of Louisiana was like a thunder-stroke for the cabinet at Madrid, who then perceived the enormous fault it had committed in sacrificing the safety of Mexico. Florida, enclosed on both sides by the United States, was separated in the middle from the Spanish dominions, and would fall on the first occasion into the hands of its neighbors." [3] No other event in our national history has done more to promote the idea of nationality than this purchase, made by the leader of the states' rights school, in disregard of his own principles. The purchase of this territory beyond our original limits, and the carving out of it of new states armed with the power to determine their own institutions, whether they should be slave or free, led to a new phase of the slavery controversy, and to the final triumph of the congressional and national powers arrayed against it. Article III of the treaty of

Jefferson's mental difficulty.

Idea of nationality promoted.

Article III of the treaty of 1803.

[1] See Taylor's *International Public Law*, 140–152, 416–418.

[2] As to the rights of the House of Representatives when a purchase is made of foreign territory, see Ibid. 392. As to the right of the nation to acquire and hold such territory, see Downes *v.* Bidwell, 182 U. S. 244.

[3] Johnston, *Am. Political History*, part i, p. 265.

April 30, 1803, provided that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages, and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." An Act was approved on October 31, 1803, "to enable the President of the United States to take possession of the territory ceded by France to the United States by the treaty concluded at Paris on the 30th of April last, and for the temporary government thereof." On March 26, 1804, an Act was passed dividing the "Province of Louisiana" into Orleans Territory on the south and the District of Louisiana to the north. That Act extended over the Territory of Orleans a large number of the general laws of this country, and provided a form of government, for the purposes of which the District of Louisiana was attached to the Territory of Indiana, which had been carved out of the Northwest Territory. The territorial government of Orleans, with the exception of the prohibition of slavery, was a substantial copy of the colonial system created by the Ordinance of 1787. On March 2, 1805, an Act was approved whose first section expressly provided that the Territory of Orleans "shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance, and now enjoyed by the people of the Mississippi Territory," to which it had been extended.[1] The upper part of the Province of Louisiana, described in the Act of March 26, 1804, as the District of Louisiana, and in the Act of March 3, 1805, as the Territory of Louisiana, was organized as the Territory of Missouri on June 4, 1812.[2] By that Act, although the Ordinance of 1787 was not in express terms extended over the territory, — probably on account of the slavery agitation, — the inhabitants were accorded substantially all the rights of the inhabitants of the Northwest Territory. By the 9th section citizenship was in effect recognized, while the 14th contained an extended declaration of the rights secured to the people of the territory. When the Americans took possession in Decem-

Province of Louisiana divided, 1804.

Territory of Missouri organized June 4, 1812.

[1] Stat. at Large, p. 550, chap. 28.
[2] Ibid., p. 743, chap. 95. See also Downes *v.* Bidwell, 182 U. S. 327–334.

ber, 1803, Laussat, the French colonial prefect, declared that justice was then administered "worse than in Turkey." But an improvement followed the new domination; and in 1808 the territorial legislature in Orleans adopted a civil code, based to a considerable extent on the Code Napoléon.[1] Within the vast territory thus acquired the new masters found slavery already established by custom recognized by French and Spanish law, and as Congress tacitly recognized existing conditions by failing to disturb them, slavery continued to be legal, and became universal. Here attention should be directed to a serious confusion of thought into which an eminent writer on this subject has fallen from a failure to understand what really constitutes positive law. Alexander Johnston, in his "Political History," has said: "It may be laid down as a fundamental proposition, that negro slavery in the colonies never existed or was originally established by law, but that it rested wholly on custom. The dictum, so often quoted, that slavery, being a breach of natural right, can be valid only by positive law, is not true: it is rather true that slavery, where it existed, being the creature of custom, required positive law to abolish or control it." [2] It is now well settled that from its organization the state, by express or tacit recognition, adopts as laws, not only the rules of equity but the entire body of customs that come up to a certain standard of general reception and usefulness, in the absence of any specific rule of written law. Holland has summed up the whole matter in the statement that "the humblest village custom is a law which complies with the requirement of being enforced by the sovereign." [3] In other words, any preëxisting custom which the state tacitly recognizes and enforces by its sovereign authority is *positive law.* In 1810 Louisiana was called "Orleans Territory," the name "Louisiana Territory" being then applied to the remainder of the Louisiana Purchase, still unorganized. By an Act of Congress of 1811 the inhabitants of the former were authorized to form a constitution, with the view to the establishment of a state government. The constitution of 1812 was framed and adopted; and in April of that year Congress passed an Act admitting Louisiana, as a slave state, into the Union.

Civil code based on Code Napoléon.

Positive law defined.

Orleans Territory admitted as a state, 1812.

[1] Cf. Taylor, *The Science of Jurisprudence*, 164–165, 174.

[2] *Am. Political History*, part ii, p. i.

[3] Holland, *Jurisprudence*, 51; Taylor, *The Science of Jurisprudence*, 518.

Colonial scheme of 1787 a model.

The general colonial scheme embodied in the Ordinance of 1787, excepting only the anti-slavery clause, was the model upon which all the territories were subsequently organized. On August 7, 1789, an Act of Congress was passed recognizing and confirming the Ordinance with such slight modifications as were necessary to make it conform to the new powers of the President and Senate. When the territory south of the Ohio came to be organized, stipulations were of course made by the ceding states that slavery should not be prohibited. In the organization of the five states north of the Ohio, the privileges granted by the Ordinance were embodied in their constitutions, usually in a bill of rights. So rapid was the growth of population in the Northwest Territory that Congress, in 1800, divided it, the line running north from the junction of the Kentucky with the Ohio, all west of which was to be known as the Indiana Territory. In that new division, in 1802, a convention, presided over by William H. Harrison, attempted to legalize slavery, through a memorial to Congress asking a temporary suspension of the sixth article. But a select committee, with John Randolph as chairman, reported that such action would be both dangerous and inexpedient. While in 1805–07 successive resolutions to the same effect from Governor Harrison and the territorial legislature were respectfully considered, the matter was brought to an end by an adverse report from a new committee in November, 1807. Thus it was settled that Indiana was to be admitted as a free state, as she was on April 19, 1816. Ohio had been erected into a separate territory in 1800; and Illinois was set off in 1809, leaving Indiana Territory with its present boundaries. An Act of Congress was passed April 7, 1798, organizing the Territory of Mississippi, — its southern boundary being parallel 31 degrees, its northern a line due east from the mouth of the Yazoo to the Chattahoochee. As this territory had been annexed by the British King to West Florida, it was claimed as common property by the Congress of the Confederation under the treaty of peace of 1783. As Spain by the treaty of 1795[1] abandoned all claims to this part of the territory, it was organized under the Act of 1798, despite Georgia's opposing

Attempt to legalize slavery in Indiana Territory.

Admitted as a free state, 1816.

[1] As to the boundaries fixed by the treaty signed at San Lorenzo el Real, Oct. 27, 1795, see Fuller, *The Purchase of Florida*, 73 *sq.*

claims, which were finally adjusted by commissioners under the Act of April 24, 1802. It was then arranged that Georgia was to cede all her western claims for a substantial consideration; all previous titles were to hold good; and slavery was not to be prohibited in the new territory. After that agreement had been ratified by Georgia and the United States, the ceded territory was added to the Mississippi Territory by Act of March 27, 1804, subject to a provision for the extinguishment of Indian titles in Georgia, by the United States. In 1812 American troops occupied Spanish West Florida, and the district east of Pearl River and south of latitude 31 degrees was added to the Mississippi Territory, which was divided by the present line between Alabama and Mississippi in 1817. On December 10 of that year Mississippi was admitted as a slave state. The statement made heretofore that Indiana was admitted as a free state must be attended with the explanation that in 1807 her legislature enacted laws permitting the owners of slaves to bring them into the territory, register them, and hold them to service under a certain kind of contract specially devised for that purpose. Illinois, being then a part of Indiana Territory, lived on under those laws until her admission as a state in 1818, when she provided in her constitution that "existing contracts" should be valid. Finally in 1822 an anti-slavery man was elected governor; and the result of a vote in 1823–24 was the abolition of future contracts for service made out of the state, or for more than one year. Gradually the disguised slavery thus created by contract was abolished in both states. On March 2, 1819, an Act was passed "to enable the people of Alabama Territory to form a constitution and state government," and on December 14 of that year she was admitted as a slave state. The settlement of Maine goes back to 1626, when both Alexander and Gorges were granted lands by the Plymouth Company, the latter receiving in 1639 a royal charter to reinforce his claims. As Charles I favored the Gorges heirs against Massachusetts, whose power over Maine had been in abeyance for some years prior to 1668, that state, in 1678, in order to strengthen its hold, bought off the Gorges claimants. When the Revolution of 1688 brought to Massachusetts a new charter, it so enlarged her territory southward as to take in all Plymouth, and eastward as to embrace Maine

Mississippi admitted in 1817.

Illinois admitted in 1818.

Alabama admitted in 1819.

(Sagadahoc) and Nova Scotia. Henceforth Maine, including Sagadahoc, that is all land eastward to the Saint Croix, remained a part of Massachusetts until March 15, 1820, when it was admitted as a free state.[1] The prelude to that event was the "Ohio fever" of 1815–16, by which the state lost fifteen thousand of its population. By that time the question of separation had become a party issue, the Federalists upholding the claims of Massachusetts, the Republicans contending for independence.

Maine admitted in 1820.

A brief and consecutive review has now been made of the incorporation into the Union of the ten new states — five free and five slave — that preceded the admission of Missouri. As we look upon the hostile array, with Vermont, Ohio, Indiana, Illinois, and Maine, on the one hand, and Kentucky, Tennessee, Louisiana, Mississippi, and Alabama on the other, it is hard to put aside this weighty statement: "The convention of 1787, whose work and plans were mainly confined to the fringe of states along the Atlantic Coast, had really joined two nations, a slaveholding nation and one which only tolerated slavery, into one; but the union was physical, rather than chemical, and the two sections retained distinct interests, feelings, and peculiarities. As both spread beyond the Alleghanies to the west, the broad river Ohio lay in waiting to be the natural boundary between the states in which slavery should be legal and those in which it should be illegal. When the tide of emigration began to pour across the Mississippi and fill the Louisiana Purchase, the dividing-line was lost and the conflict became inevitable."[2] Jefferson, who brought to us the new arena of conflict, clearly foresaw what that conflict was to be. He wrote: "The Missouri question is the most portentous which has ever threatened the Union. In the gloomiest hour of the Revolutionary War I never had apprehensions equal to those I feel from this source." His eagle eye could not fail to see that in the new realm beyond the Mississippi the battle for slavery was to be fought and lost. Reference has been made already to the organization of the upper part of the Louisiana Purchase into the Territory of Missouri by the Act of June 4, 1812, whose sixteenth section recognized the custom, validated

The Missouri Compromise, 1820.

Jefferson's forebodings.

Battle for slavery to be fought beyond the Mississippi.

[1] Cf. Andrews, *Hist. of the U. S.*, i, 45, 46, 75, 81.

[2] Johnston, *Am. Political History*, part ii, p. 110.

by French and Spanish law, upon which slavery rested, by continuing the territorial laws of Louisiana in the new Territory of Missouri. Furthermore reliance was placed upon the third article of the treaty, which provided certain guaranties heretofore set forth. The application for admission into the Union as a slave state, early in 1818, of the most populous part of the Missouri Territory, in which the flourishing institution of slavery was thus intrenched, precipitated the consideration of the status of the institution beyond the Mississippi, and involved Congress in a prolonged, angry, and historic debate.

Suddenness of the conflict.

The suddenness of the conflict startled the country "like a fire-bell in the night," — the words of Jefferson. When on February 13, 1819, the House went into Committee of the Whole upon the enabling act, Tallmadge of New York offered this amendment: "And provided, also, that the further introduction of slavery or involuntary servitude be prohibited, except for the punishment of crime, whereof the party shall be duly convicted; and that all children of slaves, born within the said state after the admission thereof into the Union, shall be free, but may be held to service until the age of twenty-five years." The surface meaning of that amendment was that the admission of Missouri as a free state should now offset that of Alabama. But there was a deeper meaning. Its advocates contended — admitting that slavery did exist in the territory by virtue of positive law tacitly recognized by Congress — that it was entirely within its province to say, as the entire subject-matter was under its control, that the territory must enter the Union as a free state or not at all.

Terms of the Missouri Compromise.

The outcome was the famous Missouri Compromise of 1820, in which the Senate agreed to permit the Maine and Missouri bills to be voted on separately; the House agreed to give up the Tallmadge proviso, and both Houses agreed that Missouri should be admitted, with the express understanding "that in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of 36 degrees 30 minutes north latitude, excepting only such part thereof as is included within the limits of the state contemplated by this Act, slavery and involuntary servitude, otherwise than in the punishment of crime, whereof the party shall have been duly convicted, shall be and is hereby forever prohibited." Such was

the compromise embodied in the amendment of the pro-Southern Senator Thomas of Illinois, of which Henry Clay of Kentucky was the potent, zealous, and compelling champion. While in the case of Missouri, admitted in 1821, slavery won the victory, it was at the cost of the pledge that the vast bulk of the Louisiana Purchase should be forever dedicated to freedom. That pledge was the death-knell of the old system of balance between the slave states and the free states, as it made inevitable the admission of a larger number of the latter. And yet, while limits were thus set to the extension of the area to be occupied by slavery, the view was general that each state was absolutely sovereign over it within its own borders; that responsibility for it and its abuses ended in each state with its own citizens. Such was the real undertone of the doctrine of state sovereignty in the extreme form in which it was taught by Calhoun, an extreme culminating at last in the entirely illogical and indefensible dogma of Nullification. Ere long, quite a contrary view became common in the North, largely through the influence of William Lloyd Garrison, who established in 1831 a weekly paper called "The Liberator," which was devoted to the entire and immediate abolition of African slavery in America. In demanding "immediate and unconditional emancipation," Garrison claimed that the question at issue was a national one; that the whole country, and not the South only, was guilty in tolerating what he called a curse. Thus was the real issue finally made up.

Missouri admitted in 1821.

Extreme view of state sovereignty.

Fifteen years were to pass by before the admission of the next state,—Arkansas, in 1836. During that interval there was a transformation in party organization. At the end of the Revolution there was but one party in the United States, the American Whigs; at the end of the Federal Convention of 1787, when the question at issue was whether the new Constitution should be ratified by the states, there were two. The one was composed of the Federalists, who, desiring a really national government, were urging the people to accept the work of the Convention; the other was composed of those who were wedded to the old provincial idea and distrustful of the new experiment as a menace to their local liberties, known as Anti-Federalists.[1] The name afterwards assumed by the Anti-

Federalists and Republicans.

[1] "We must be careful not to confuse the Anti-Federalists with the

Federalists, who, during the year 1792, had become cemented into an organized body through their efforts in resisting the Federalists, was Republican from about that time down to about 1828.[1] As Hamilton was, at the outset, distinctly the leader of the former, so Jefferson was distinctly the leader of the latter. Not long after Jefferson's return from the opening scenes of the French Revolution, he was ready to hint that people of the Hamilton school were, under the cloak of broad construction, drifting toward monarchy. Before the summer of 1792 he was able to describe in a general way the opposition to Hamilton as a "republican" party in contrast to the "monarchical" Federalists. In a letter to Washington, of May 13 of that year, he authoritatively claimed the name by saying: "The Republican party, who wish to preserve the Government in its present form, are fewer in number [than the monarchical Federalists]." The disappearance of the Federal party between 1815 and 1820 left the Republicans masters of the field. In the presidential election of 1816, the Federalist candidate, Rufus King, received only 34 electoral votes against 187 for the Republican candidate, James Monroe, who was reëlected in 1820 by a practically unanimous vote. But in the midst of this political millennium, known as the "era of good feeling," the triumphant Republican party became responsible for two events (1819–20) — the acquisition of Florida and the admission of Missouri as a slave state — which demonstrated that its Northern and Southern wings differed from each other with a bitterness and intensity that might have divided two hostile camps. The so-called era of good feeling ended with the election of John Quincy Adams to the Presidency in 1824; a contest in which there were no recognized parties, political issues being so confused that the battle turned chiefly upon the personal merits of the candidates, all of whom claimed to be

Hamilton and Jefferson as leaders.

"Era of good feeling," 1820.

Republicans, or Democrats, who began to exist as a party about 1791. The questions at issue between the two parties in 1791 were entirely different from the single question which divided the Federalists and Anti-Federalists in 1787. Shall the Constitution be adopted? — that was the one question at issue in 1787." Gordy's *Political Parties in the United States*, i, 92, 93.

[1] The questions that divided the Federalists and Republicans during the administrations of Washington and Adams related to foreign affairs, finance, and the proper construction of the Constitution.

Republicans. In the presidential canvass of 1828 the two sections of the great Republican party assumed the character of opposing forces, the supporters of Jackson assuming the name of Democrats, while his opponents, who favored the reëlection of Adams, were known first as National Republicans, and finally as Whigs. Henceforth until 1854, Whig and Democrat were the names of the two great political parties of the United States. The former, representing many of the views of the Federalists, — such as the expenditure of public money on internal improvements, a tariff for the protection of manufactures, a larger army and navy, — found its main though not its sole support in the commercial and manufacturing centres of the country, that is in the Middle States and New England. The latter, representing the theories and traditions of the Jeffersonian Republicans, — such as the restrictive construction of the Constitution, an extreme view of states' rights, and an inclination in the direction of free trade, — found its main support among the farming classes, notably in the South. Toward the close of Jackson's second administration, while Whigs and Democrats were sharply opposing each other, Arkansas, which had been organized as a territory in 1819, without any restriction on slavery, was, on June 15, 1836, admitted as a slave state, under the terms of the Missouri Compromise. When a disposition was manifested on the part of the North to revolt, even John Quincy Adams insisted that the admission of Arkansas as a slave state was "so nominated in the bond," and must not be opposed. The Northwest Territory was then called upon for another free state, and the result was the admission of Michigan on January 26, 1837.

Democrats and Whigs, 1828.

Arkansas admitted in 1836, Michigan in 1837.

With the admission in 1845 of Florida and Texas, the territorial limits of slavery received their last extensions. By the treaty of 1763, Spain ceded Florida to Great Britain in return for Cuba, and under the English the province increased in prosperity and loyalty. When the news of the events of July 4, 1776, reached St. Augustine, John Hancock and Samuel Adams were burned in effigy by a cheering crowd of loyalists.[1] In 1781 Galvez captured Pensacola,[2] and in 1783,

Florida and Texas the last slave states admitted, 1845.

[1] Fuller, *The Purchase of Florida*, 16–17.

[2] See Hamilton, *Colonial Mobile*, 257; Campbell, *Colonial Florida*, 135, 140; and Washington's *Works*, 176.

Florida was ceded back to Spain by a treaty declaring that "his Britannic Majesty ceded and guaranteed to his Catholic Majesty Eastern and Western Florida."[1] That treaty left behind it a complicated controversy as to boundary with Louisiana, which resulted in an order from the President to Governor Claiborne of the Territory of Orleans to take possession of West Florida, which he did, in 1810, with the exception of Mobile, possession of which was not taken until 1813. At the same time the South had its eyes on East Florida, of which the President was authorized to take "temporary possession" by acts of January 15, and March 3, 1811, passed secretly. The necessity for such a course increased as that lawless region was filled up with filibusterers, hostile refugee Creeks, and many negroes of whose services free use was made during the War of 1812 when English and Spaniards made it a base of raids upon our territory. In July, 1816, a "negro fort" was blown up by an American force sent into Florida for that purpose. After Jackson had raided East Florida in 1818, during the Seminole War, a treaty of cession from Spain to the United States was signed in February, 1819, which was ratified in 1821. In 1822 an Act of Congress was passed as in the case of Missouri, which, while not referring in express terms to the Ordinance of 1787, in effect endowed the inhabitants of that territory with the rights granted by that Ordinance. After the end of the Seminole War in 1842, and the removal of the remnants of the Indians across the Mississippi, Florida was admitted as a slave state in March, 1845. As in the cases of Louisiana and Missouri, the custom of slavery, tacitly recognized by congressional legislation, had been in existence there long prior to annexation.

Possession taken of West Florida, 1810.

East Florida and treaty of 1819.

Florida admitted in 1845.

Texas ceded by France to Spain, 1763.

Despite the persistent claims of Spain, France took possession of Texas in 1685, nor did she ever relinquish it until 1763, when the whole of Louisiana west of the Mississippi was ceded to Spain. Ever since the purchase of Florida from Spain in 1819, the southwestern boundary of the United States had been recognized as the Sabine River, west of which extended

[1] "This title extinguished all French claims, for by the treaty of 1763 France had ceded all east of the Mississippi to England. Following the language of the English proclamation of 1763, Spain maintained, after 1783, the divisions of East and West Florida." Fuller, *The Purchase of Florida*, 141.

the then foreign land of Texas. After the successful revolt of Mexico, by the treaty of Cordova, February 24, 1821, "Texas and Coahuila" became one of the states of the Mexican Republic. While slavery was not recognized in the constitution of that state, nor in the provisional Texas constitutions of 1833 and 1835, American settlers had brought their slaves with them and fairly introduced the custom of slavery, which was formally recognized in the constitution of 1836, declaring all persons of color slaves for life, if they had been in that condition before their emigration to Texas, and were then held in bondage. On March 2, Texas asserted the right of secession by declaring its independence of Mexico; and in 1837 its independence, though never acknowledged as such by Mexico, was recognized by the United States, England, France, and Belgium. When the question of the annexation of Texas was hotly discussed in the presidential campaign of 1844, Van Buren, who opposed it, was set aside by the Democratic party for James K. Polk, who favored it. In January, 1845, after the election of Polk, Congress consented that Texas might be erected into a new state, subject to three conditions, the last of which was that "new states of convenient size, not exceeding four in number, in addition to the State of Texas, and having sufficient population, may hereafter, by the consent of said state, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution; and such states as may be formed out of that portion of the territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise line, shall be admitted into the Union with or without slavery, as the people of each state asking admission may desire. And in such state or states as shall be formed out of said territory north of said Missouri Compromise line, slavery or involuntary servitude (except for crime) shall be prohibited." The power to annex by treaty was exercised in 1803, despite the doubts as to the legality of that method of proceeding. Now annexation even without a treaty was carried out as in 1803 by the votes of the party of strict construction. In December the annexation of Texas was completed without the formality of a treaty. With the election of Polk the North and South were finally arrayed in opposition

"Texas and Coahuila" one state.

Texas a new state subject to three conditions.

Annexation without treaty.

to each other, — the slavery question became the "burning question from that time down to the appeal to arms."

Population of the Southwest prior to 1830.

Prior to 1830, the Southwest had filled up more rapidly than the Northwest; at that date the centre of population was farther south than it has ever been at any other time. Comparatively little of the soil of Michigan, Iowa, Minnesota, and Wisconsin had as yet been occupied, although settlements were being made on most of the larger streams. The Territory of Iowa had in 1836 only 10,500 inhabitants, in1840, only 43,000, at which time Wisconsin had only 31,000. At that date nearly all of the lands of the United States east of the Mississippi had been taken up by settlers. So far the mass of immigration was as yet native, as the great rush from Europe did not begin until about 1847.[1] Out of such conditions arose the next two states admitted as free states. In 1834, all that part of the United States lying west of the Mississippi River and north of Missouri, including the present area of Iowa, was placed under the jurisdiction of the Territory of Michigan, and two years later the Territory of Wisconsin, including what is now Iowa, was created. In 1838, Iowa itself, originally a part of the Louisiana Purchase, was made a territory, and on December 28, 1846, it was admitted to the Union as a state. By the Ordinance of 1787, Wisconsin had been a part of the Northwest Territory; in 1800 it was included in Indiana Territory, whence in 1809 it passed to Illinois Territory, and finally to Michigan Territory. Not until 1836 was Wisconsin Territory created. After the constitution framed in 1846 had been rejected by the people, a second was ratified in 1848, and Wisconsin became a state on May 29 of that year.

Iowa admitted in 1846;

Wisconsin in 1848.

Mexican War a victory for slavery.

The sequel of the annexation of Texas was the Mexican War, resulting in a vast acquisition of territory, which came as an additional victory for slavery, because, as nearly all of it lay south of 36° 30′, it could become, under the terms of the Missouri Compromise, slave soil. A drawback existed, however, in the fact that in the new territory thus acquired, slavery had been forbidden by Mexican law. Mexican soil was declared to be free under the decree of Guerrero, the Mexican Dictator, in 1829, afterwards ratified by the Mexican Congress. That fact predisposed many who were not in general opposed to

Its soil had been made free.

[1] Cf. Andrews, *Hist. of the United States*, i, 370–372.

slavery against extending the institution thither. As an expression of that feeling, David Wilmot, a Pennsylvania Democrat, following in the footsteps of Tallmadge, introduced in the House in 1846 his famous Proviso, applying to any newly acquired territory the provision of the Ordinance of 1787, "that neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall be first duly convicted." While the Wilmot Proviso failed to pass, it called into existence the Free-Soil party, founded by the union of anti-slavery Democrats and Whigs with the Abolitionists. Through the power of the Free-Soilers to draw the Democratic vote from New York, the Presidency passed to Taylor, who, despite the fact that he was a Louisiana slaveholder, was unflinching in his devotion to the Union. Eager as Taylor was to bring California in before the question of slavery in that territory could be discussed in Congress, he urged the people to call a convention and organize a state. That they did in 1849; and as the bulk of them were from the North, they framed a constitution prohibiting slavery, and applied for admission. In the crisis this brought about all eyes turned to the great Compromiser who had taken the country safely through the Missouri crisis of thirty years before. Clay now proposed that California should be admitted as a free state; that any new states properly formed from Texas should also be admitted; that the territories of Utah and New Mexico should be organized without the Wilmot Proviso; that a more rigid Fugitive-Slave Law should be enacted; and that the slave trade should be abolished in the District of Columbia. Finally, on September 7, 1850, a bill passed Congress admitting California into the Union as a state, without slavery, but leaving Utah and New Mexico open to its introduction.

Wilmot Proviso, 1846.

Free-Soil party.

California and the Compromise of 1850.

The Democratic Convention that met in Baltimore in 1852 pledged that party to the observance of the Compromise of 1850; the Whig Convention that met in the same place in June indorsed the Compromise and the Fugitive-Slave Law; the Free-Soil Democratic Convention that met at Pittsburg in August declared slavery to be a sin against God and a crime against man, and denounced the Compromise of 1850 and the two parties that supported it. After the triumph of Pierce and

Triumph of Pierce and ruin of the Whigs.

South at a loss for slave territory.

the ruin of the Whigs, the South was at a loss what to do for new slave territory, now that the North had a preponderance through the admission of California and the rapid growth of the Northwestern States, in which New England ideas had become predominant. As slavery had reached the limits of its state extension in 1845 with the admission of Florida and Texas, to the territories alone all future attacks had to be directed. Passing over the attempt to buy Cuba, which failed at Ostend in 1854, we must look next at the scheme to acquire more territory into which to extend slavery in the region lying west of Missouri and Iowa, to the north of 36° 30′, and which, under the Missouri Compromise, was ever to be free soil. The project that contemplated the repeal of that famous compact proved successful, so far as legislation could go, when a bill, introduced in the Senate in December, 1853, to organize the Territory of Nebraska received the support of a sufficient number of Free-Soil Democrats to make it a success. A week later, a new bill was brought in, known as the Kansas-Nebraska Bill, approved May 30, 1854, which divided the region covered by the first into two territories, one directly west of Missouri, to be called Kansas, and the other, north of this, to be called Nebraska. Thus two states were to be opened to slavery instead of one, for the new bill distinctly declared that the Missouri Compromise had been swept away by the later Compromise of 1850. The passage of the bill in question was coupled with the contention that, as the population of the territories had the natural right to decide for themselves the character of their own local institutions, Congress had no authority to vote slavery in or out for them. That idea, known as Squatter Sovereignty, was the invention of Stephen A. Douglas, a Northern Democrat, who proposed thus to lay bare the finest region of country open for settlement as a battle-ground between the slave-labor and the free-labor systems. When the Kansas-Nebraska question passed from Congress to Illinois in the fall of 1854, Douglas was called upon to defend his claim that the slavery question was forever settled by his invention of "popular sovereignty," which, he said, took it out of Congress, and gave it to the people of the territories to decide as they pleased. The anti-Nebraska party in Illinois, when forced to find a champion who could meet

Failure to buy Cuba.

Kansas-Nebraska Bill, 1854.

Douglas and squatter sovereignty.

"the little giant" in debate, agreed upon Abraham Lincoln, who had served a single term in Congress (1847–49). The time had now arrived when Douglas was to be told that slavery was not a local but a national question, that any particular institution in any locality that affects the welfare of all is the common concern of all. Lincoln's expressions on that subject were the first articulate outcry of the new national spirit, just after the nation awoke to a full sense of its oneness. In one of his early meetings with Douglas, Lincoln said: "Let us re-adopt the Declaration of Independence, and the practices and policy which harmonize with it. Let North and South — let all Americans — let all lovers of liberty everywhere — join in the great and good work. If we do this we shall not only have saved the Union, but we shall have so saved it as to make and keep it forever worthy of the saving. We shall have so saved it that the succeeding millions of free, happy people, the world over, will rise up and call us blessed to the latest generations." Such was the prelude to the more famous Lincoln-Douglas debates of 1858.[1] Then it was, after an interval of eight years, that the admission of another free state followed that of California. On March 20, 1804, Upper Louisiana was organized, consisting of Arkansas, Missouri, Iowa, and a large part of Minnesota. Not, however, until March 3, 1849, did a bill pass organizing the last-named as a territory. In 1851 the Indians gave up their rights by treaty, and in 1857 a constitution was adopted. On May 11, 1858, Minnesota was admitted as a state into the Union. No part of the territory of the United States has a more difficult history than that embraced within the limits of Oregon. As the author has attempted, in another work, to condense that history into a narrow compass, he will content himself here with a simple reference to that attempt.[2] The Oregon country was really secured in 1846 by the treaty with Great Britain, which fixed the boundary between British America and the United States west of the Rocky Mountains as at present defined. In 1848 the territorial government was established, and on February 14, 1859, Oregon was admitted as a state into the Union.

Abraham Lincoln.

Lincoln-Douglas debates of 1858.

Minnesota admitted in 1858.

Oregon admitted in 1859.

[1] See the author's article in *The North American Review* for February, 1909, entitled "The Lincoln-Douglas Debates."

[2] Taylor, *International Public Law*, 130, 134, 136, 146.

Summary.

A point has now been reached at which it is possible to sum up the results of the seventy years' struggle between the free and slave states for the political control of such sovereign powers as were vested in the national legislature by the Constitution adopted in 1789. Prior to the admission of Missouri in 1821, the process of preserving the balance of power by the alternative admission of a free and slave state had proceeded without interruption. The result up to that point was five free and five slave states. With the admission of Oregon in 1859, the political balance-sheet indicated a decided advantage in favor of one of the competitors. In the column of free states, admitted since 1789, there stood Vermont (1791), Ohio (1803), Indiana (1816), Illinois (1818), Maine (1820), Michigan (1837), Iowa (1846), Wisconsin (1848), California (1850), Minnesota (1858), Oregon (1859),— eleven. In the column of slave states, admitted during the same period, there stood Kentucky (1792), Tennessee (1796), Louisiana (1812), Mississippi (1817), Alabama (1819), Missouri (1821), Arkansas (1836), Florida (1845), Texas (1845),— nine. Thus it appears that the South was vanquished in the seventy years' battle for political control through the organization of new states on slave soil.

Eleven free and nine slave states in 1859.

The Dred Scott case, 1857.

Just before the end came, the conflict was shifted from the political to the judicial arena. When in 1846–50 an attempt was made to extend the Missouri Compromise, an act of congressional legislation, to all the territory acquired from Mexico, it was defeated by the Compromise of 1850, under which Congress and the territorial legislatures were bound to refrain from dealing with the subject of slavery in the new territories at all. When in 1854 the Missouri Compromise was abrogated, leaving to the people of each territory the right to decide the question of slavery as they pleased, began the Kansas-Nebraska struggle whose result, as stated above, demonstrated that slave-state immigration could not compete with free-state immigration under the rules which the Douglas "popular sovereignty" scheme defined. It only remained for the judicial power to determine whether or no Congress had constitutional authority to exclude slavery from the territories; was the act of congressional legislation embodied in the Missouri Compromise constitutional? In the case of Dred Scott *v.* Sandford,[1] decided

Was the act embodied in the Missouri Compromise constitutional?

[1] 19 How. 393.

March 6, 1857, the Supreme Court held that it was not. The vital facts of the case, which began in the Federal Circuit Court for Missouri in 1854, are these: In 1834, Dr. Emerson took his negro slave, Dred Scott, from Missouri first to Illinois, where slavery was prohibited by statute, then to Wisconsin, a part of the Louisiana Purchase, where slavery was prohibited by the Missouri Compromise. In 1838, Dr. Emerson returned with his slave to Missouri. Then it was that Scott, or some one for him, conceived the idea that by touching the free soils of Illinois and Wisconsin during his absence he had been set free. In other words, the direct purpose of the case was to ascertain whether or no the doctrine laid down by Lord Mansfield in Sommersett's case — wherein it was held that a slave, taken to England from one of the American colonies where slavery was legal, was set free by touching the soil of England, where slavery was not recognized by positive law — could be applied under our Constitution, whose compromises expressly recognized the existence of slavery as a matter of positive and supreme law. An eminent English jurist has thus stated in a few words the essence of the Dred Scott case: "There, a person, having the status of slave in a state where slavery was legal, was taken by his master into a free state of the Union in which slavery was prohibited by law; nothing, however, was there effectually done to alter the condition of the slave, and it was held that on returning to a slave state he again became a slave." [1] On the theory that he was a free man after his return to Missouri, Dred Scott contended that a whipping there given him by his master in 1848 was an assault and battery, for which he brought suit in a state court at St. Louis and obtained judgment. While that case was pending in the State Supreme Court, Dr. Emerson sold his slave to Sandford of the city of New York. Upon the theory that Scott and Sandford thus became "citizens of different states," the former brought suit against the latter for assault and battery in the Federal Circuit Court for Missouri, where Sandford pleaded that the plaintiff was not as alleged a citizen of Missouri but "a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves." Scott in demurring to that plea

An attempt to apply the doctrine of Sommersett's case.

Plea to the jurisdiction — was Scott a citizen?

[1] Broom's *Constitutional Law* (Denman, 2d ed.), 103.

claimed that he was a citizen on defendant's own showing, and his demurrer was sustained. Sandford then pleaded to the merits that plaintiff was his negro slave and that as such he had "gently laid hands on him" as he was authorized to do by law.

After the court had declared the law to be with the defendant, plaintiff presented exceptions upon which the case passed to the Supreme Court, where the primary question was one of jurisdiction. Was Scott a "citizen of Missouri" within the meaning of the Constitution? If he was not, the Federal Circuit Court had no jurisdiction of his case; and he certainly was not a citizen but a slave, unless his residence in Illinois, where slavery was prohibited by statute, and in Wisconsin, where slavery was prohibited by the Missouri Compromise, had set him free. The constitutionality of the Compromise was thus the essence of the issue, because upon its validity depended the fact whether Scott's status as a slave was affected by his presence on the soil of Wisconsin. If Mansfield had been governed by an Act of Parliament directing him to return Sommersett to his master as a fugitive slave, so that his status as such, established by the law of Virginia, where he had been purchased, might be preserved at London, he would have said at once slavery is here upheld by positive law. So the Supreme Court was compelled to hold, because by the positive and supreme law embodied in the "compromises of the Constitution" the status of a slave fixed by the law of one state followed him to such an extent into every other state that his return as such was guaranteed by positive law. Article III, Sec. 2, Clause 3, expressly declared that "no person held to service or labor in one state, under the laws thereof, escaping into another state, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom service or labor may be due." In a word Scott could not win unless the doctrine of Sommersett's case could be applied to his, and such an application was expressly forbidden by the clause in question. The fault was in the provisions of positive constitutional law which the Court could not alter. Therefore William Lloyd Garrison, with perfect consistency, directed his attacks against the Constitution itself, or against those parts of it in which the

Constitutionality of Compromise essence of issue.

Fugitive-slave clause.

Consistency of Garrison.

compromises were embodied.[1] The North revolted against the judgment of the Court, and refused to acquiesce in it, not because it was not a correct announcement of the positive law, but because the great moral revolt that had its roots in Sommersett's case had repudiated the positive law and made it odious. No serene and impartial student of the Constitution should ever for a moment doubt that the conclusions reached by the Supreme Court in the Dred Scott case were in perfect accord with the positive law as defined in the compromises of the Constitution. On the other hand, no such student of the history of humanity will ever for a moment doubt that such conclusions were in sharp conflict with what Seward called "the higher law" — that is, the law on the subject of slavery as it had been fixed at that time by the consensus of the civilized nations. When at an earlier day the Supreme Court aroused the country by holding, in Chisholm *v.* Georgia, that a state was suable by a private citizen, the matter was remedied by the Eleventh Amendment. So in due time the conclusion reached in the case of Dred Scott was reversed by the Thirteenth Amendment, which provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The moment it was ascertained in Dred Scott's case that his status as a slave had never been changed by the laws of the free states into which he was taken, the contention that he was a citizen, in any sense, became hopelessly untenable.[2]

Thirteenth Amendment.

By that time the disruptive force of the slavery question had rent in twain everything that could be dismembered. Excepting the Catholics and Episcopalians, it had split the great

Disruptive force of slavery question.

[1] Because the Constitution put the institution of slavery under the protection of the supreme law of the land, Garrison denounced it as a league with the Devil and a covenant with Hell.

[2] The fact that it required a constitutional amendment to abolish slavery puts it beyond all question that the Supreme Court of the United States had no authority to abolish it, in the absence of such an amendment. One of the harshest critics of the judgment in question frankly admits that "the action had been brought by Scott in the Circuit Court of the United States for the District of Missouri, *to establish the freedom of himself, his wife, and their two children.*" Carson, *History of the Supreme Court*, 367. Will any jurist now contend that the federal courts, under the Constitution as it then stood, had the power to grant that prayer?

religious denominations into Northern and Southern churches. It had split into two sections the Whig party, which went to pieces after the election of 1852. For two years thereafter there was really but one great party, the Democratic party, which was called upon in 1854 to pass the Kansas-Nebraska Act, made law by the votes of Northern and Southern Democrats, and Southern Whigs. At the first election for members of Congress after the passage of that Act, every one in the North hostile to the extension of slavery enlisted in the ranks of those opposed to the Kansas-Nebraska Bill, — an organization called at first "Anti-Nebraska Men," and before the new Congress met, Republicans. From the time the Kansas-Nebraska question passed from Congress to Illinois in the fall of 1854, the leader of the new party was Abraham Lincoln, whose quaint originality, aptness of phrase, cleanness of definition, and poetical fervor often culminated in flights of genuine eloquence. Of his brilliant antagonist, Douglas, it has been said, that "he was tireless, ubiquitous, unseizable. It would have been as easy to hold a globule of mercury under the finger's tip as to fasten him to a point he desired to evade." But against all his arts Lincoln made good the simple contention that all local questions that affect all are the common concern of all, which contention has become the corner-stone of our new national life. The result of the first application made of that principle by the reunited nation was the destruction, with the hearty concurrence of the South, of a peculiar social institution within the Territory of Utah which conflicted with the general principles of our civilization.[1] In "the battle of giants," as the Lincoln-Douglas debates of 1858 are usually called, two immortal tribunitian orators spoke really the last words in the bitter and prolonged contestation over slavery that culminated in the Civil War. The inconsistent attitudes Douglas was forced to assume by reason of the decision in the Dred Scott case exposed him to attacks from friend and foe. After its rendition Lincoln thus taunted him: "The first thing I ask attention to is the fact that Judge Douglas constantly said, before the decision, that whether they could or not was a question for the Supreme Court. But, after the Court has

Lincoln leader of Republican party.

His contention corner-stone of new national life.

Discomfiture of Douglas.

[1] See Church of Jesus Christ of Latter-Day Saints *v.* U. S., 136 U. S. 1; U. S. *v.* Church of Jesus Christ, etc., 150 U. S. 145.

made the decision, he virtually says it is not a question for the Supreme Court, but for the people." Not long after the meeting of the Democratic National Convention at Charleston in April, 1860, Judah P. Benjamin, of Louisiana, said in the Senate: "Sir, it has been with reluctance and sorrow that I have been obliged to pluck down my idol from his place on high, and to refuse him any more support or confidence as a member of his party. . . . We accuse him for this, to wit: that having bargained with us upon a point upon which we were at issue, that it should be considered a judicial point; that he would abide the decision, that he would act under the decision, and consider it a doctrine of the party; that having said that to us here in the Senate, he went home, and under the stress of a local election his knees gave way, his whole person trembled. His adversary stood upon principle and was beaten; and lo! he is the candidate of a mighty party for the Presidency of the United States." Not until a change was made in the party majority in the Senate by the withdrawal of the Southern Senators was Kansas at last admitted as a state, January 29, 1861, under the Wyandotte constitution, by which slavery was prohibited. No slave state had been admitted since 1845. During the intervening sixteen years six free states — Iowa, Wisconsin, California, Minnesota, Oregon, and Kansas — had marched consecutively into the Union.

Kansas admitted in 1861.

# CHAPTER X

## SIXTY-ONE YEARS OF CONSTITUTIONAL GROWTH (1804–65)

Savigny — law as a part of national life.

WHEN in 1814 Savigny, the founder of the historical school of jurisprudence, published his "*Beruf unserer Zeit*," he made a revelation to the world through his declaration that law is part and parcel of national life. "I regard the law of each country," he said, "as a member of its body, not as a garment merely, which has been made to please the fancy, and can be taken off at pleasure and exchanged for another." Instead of regarding law as the creation of the will of individuals, he maintained it to be the natural outcome of the consciousness of the people, like their social habits or their language; the people, he said, is always the true legislator ("*Das Gesetz ist das Organ des Volksrechts*"). He thus assimilated changes in law to changes in language.[1] "As in the life of individual men no moment of complete stillness is experienced, but a constant organic development, such also is the case in the life of nations, and in every individual element in which this collective life consists. So we find in language a constant formation and development and in the same way in law." [2] Max Müller has said that a living language is like a mountain stream which is ever changing and widening as it moves on in its course; that a dead language is like such a stream when the frost of winter checks its onflow and hardens it into ice. The moment a language ceases to change through growth it is dead; the moment a constitution ceases to change through growth it is dead. In the light of that truth Sir James Mackintosh said: "Constitu-

[1] "In no conceivable condition of mankind could it [law] ever have stood alone. It is peculiarly the product of every social force existing at any moment in the community; it reacts back upon the social forces as being in itself the most potent force of all." Amos, *A Systematic View of the Science of Jurisprudence*, 18.

[2] In 1815 appeared the first volume of Savigny's *Geschichte des römischen Rechts im Mittelalter*, the last volume of which did not appear until 1831. *System des heutigen römischen Rechts* (8 vols. 1840–49); *Das Obligationen-recht* (2 vols., 1851–53).

"Constitutions are not made, they grow."

tions are not made, they grow." Despite the fact that a part of our Constitution, the federal part, is an artificial creation, despite the fact that it is encased in precise and dogmatic written formulas, despite the fact that change through the prescribed forms of amendment is next to impossible, — the truth remains that during something more than an hundred years it has passed through a wider expansion than any other in history. Its most notable single trait is its elasticity, its growing-power. By solemn restatements in written instruments at long intervals of its basic principles, the growth of the English Constitution has been directed, not retarded. When Magna Carta (1215), the Petition of Right (1628), the Acts of the Long Parliament (1640–41), the Habeas Corpus Act (1679), the Bill of Rights (1689), the Act of Settlement (1700 and 1701), the Reform Bills, beginning with that of 1832, are viewed as a connected and progressive whole, we see how the ancient and originally unwritten Constitution of England has been developed, from age to age, by the aid of these dogmatic restatements of it. As by arboriculture the growth of trees may be advanced and directed, so by the processes of Political Science the growth of constitutions may be advanced and directed. Thus the English Constitution has passed through a long process of change and of growth, it has taken on many new forms, it has borne great fruit, it has controlled the destinies of a nation "which," in the happy phrase of Taine, "while reforming in all directions, has destroyed nothing; which has preserved both its trees and its constitution, which has lopped off the dead branches without leveling the trunk; which alone, in our days, among all nations, is in the enjoyment not only of the present, but the past." [1]

English Constitution partially embodied in documents.

A long process of change and of growth.

State constitutions outcome of evolution.

We began our constitutional life by embodying in our original state constitutions the ripe fruits of England's political growth. In that way our first constitutions were the products of political evolution. When the time came for confederation we adapted to our wants a foreign and entirely artificial federal fabric which was outgrown in about twelve years. Through a great invention then made, we entered into an entirely new and unique union, partly federal and partly national, whose defects had to be remedied by twelve amend-

[1] *Hist. of Eng. Literature*, ii, 517.

ments adopted within the period of fifteen years. Still a radical defect remained. The new system, operating directly upon the citizen, had no citizens in its own right. As we grew into a nation it became necessary to remove that defect through the creation of a genuine national citizenship, a result obtained by the adoption in 1868 of Section 1 of the Fourteenth Amendment. Through the silent revolution thus wrought the centre of gravity of the composite structure was shifted from the states to the nation. And so by the adoption, from time to time, of new principles defined in written instruments, we are advancing, as England has advanced, from one stage of growth to another. Nothing could be more superficial than the attempt to differentiate the English and American constitutions by the entirely false and misleading statement that the one is unwritten, the other written. The fact is that the series of written documents in which each is now defined are equally precise, dogmatic, and voluminous. In the last analysis the fundamental difference that divides the two systems is embodied in the fact that the supreme and ultimate power in the one is vested in the omnipotent Parliament, in the other in the Supreme Court of the United States. A practical illustration may be drawn from existing conditions. There is in England, at this moment, an urgent need for the abolition or reform of the House of Lords. To the omnipotent Parliament the entire subject is committed, — the last word must determine the new form the Constitution is to assume. In the United States the transition from individualism to collectivism has wrought a revolution in economic conditions whose outcome involves the right of the national government to abolish or seriously modify trusts and monopolies. Congress has exhausted its legislative power, and it now remains for the Supreme Court to determine whether or no its efforts have been efficacious. By judicial construction the Sherman Anti-Trust Law may be paralyzed, as it was in United States *v.* the Knight Co.; or it may be given full effect, as it was in the Northern Securities Company case; or it may be given a limited effect by a compromise judgment pausing midway between the two. As it is entirely impracticable as a general rule to amend the Federal Constitution in a formal way to meet the changed conditions incident to growth, it only remains for

How we have advanced from one stage of growth to another.

Omnipotent Parliament and Supreme Court.

Congress subject to its final revising power.

Congress to make a tentative effort when serious changes become necessary, subject to the final revising power of the Supreme Court of the United States. Such an effort upon the part of Congress may be annulled entirely as unconstitutional, or its act may be given by the Court an operation and effect never intended by the legislature. In all advancing societies the problem of problems is that involved in the expansion and readjustment of constitutions and codes to changed conditions arising out of growth. As the British Empire has expanded, that function has been performed chiefly by the omnipotent Parliament; as the American Commonwealth has expanded, that function has, for two reasons, been performed chiefly by the Supreme Court of the United States. Those reasons are: first, the difficulty of formal constitutional amendment; second, the power of the Supreme Court to annul national laws, or to remould them by construction.

Struggle between national and provincial spirit.

According to the first census the population of the original thirteen states and two territories was 3,673,570, possessed of 843,246 square miles.[1] According to the twelfth census the population of forty-six states and two territories is 91,972,266, possessed of 2,974,159 square miles. Throughout that process of growth and expansion there has been an eternal warfare between two antagonistic principles, each struggling for the mastery. The one was the old provincial spirit embodied in the first Constitution, the other was the new national spirit embodied in the existing Constitution. The potent ally of the former was slavery; the potent ally of the latter was the ever increasing force of intercommunication. At the end of the Revolutionary War the people who dwelt in the straggling series of republics long drawn out along the Atlantic seaboard had so dim a sense of union, and were so deeply imbued with the love of local self-government, that Josiah Tucker, Dean of Gloucester, in ridiculing the idea that they could ever be united "under one head, whether republican or monarchical," said: "They can never be united into one compact empire under any species of government whatever; a disunited people till the end of time, suspicious and distrustful of each other, they will be divided and subdivided into little commonwealths or principalities, according to national boundaries, by great

Dim sense of union at the outset.

[1] See *A Century of Population Growth in the U. S.*, 1790–1900, 47, 51, 54.

bays of the sea, and by vast rivers, lakes, and ridges of mountains." [1]

Presence of slavery.

Pronounced as such conditions were, they were gravely intensified by the presence of slavery, which did so much in its day to render impossible a real chemical union between a slaveholding section, with distinct feelings, interests, and peculiarities, and a section never willing to do more than to tolerate its existence in the other. The natural outcome of that antagonism was the seventy years' struggle for the extension of slavery into the new states which has been outlined already. Against such mighty forces, all making for disunion, the new national spirit embodied in the second Constitution would have been helpless, despite the strength of its nationalizing machinery operating directly on the individual, had it not been for the unifying force of rapid intercommunication. Without the steamboat, the locomotive engine, and the telegraph, existing conditions would have been impossible. Except such large freight as went by sea around Cape Cod, two large coaches were enough in 1783 for all the travelers, and nearly all the freight besides, that passed between Boston and New York. A revolution was wrought in the travel and commerce of this country through a transition from the primitive and ineffectual means of transportation by pack-horse, stage, and wagon to the new methods resulting from the application of steam to locomotion on land as well as water. The growth of the new national system embodied in the existing Constitution was made possible only through the new methods of intercommunication. It is doubtful whether without their aid the Union could have been preserved; it is certain that without their aid the existing conception of national unity could never have been brought about. No thinking mind can reject Savigny's contention that law, constitutional law, is part and parcel of the national life; it is the outcome of the consciousness of the people like their social habits or their language.

Influence of intercommunication.

Through the operation of the nationalizing forces to which reference has been made, the old provincial conception of local

[1] "That in the creation of the United States the world had reached one of the turning-points in its history, seems at the time to have entered into the thought of not a single European statesman." Green, *History of the English People*, iv, 272.

self-government, intensified in one section, as it was, by the existence of slavery, has been forced to yield to the new national conception by which the original view of the rights of the states as sovereign communities has been modified without being vitally impaired. In that process of nationalization an independent individualism, which feared and resented at the outset nearly every form of state control, has been taught to appeal to governments, state and federal, for constant interference in the daily life of the citizen. The result has been a narrowing circle of individual rights. As a very distinguished jurist has recently expressed it: "It is no longer the preservation of a strong and independent individualism that is the object of solicitude. It is the creation of a state of dependence of the individual for his safety on the state. . . . Down to and beyond the era of the American and French Revolution, he [the citizen] had everywhere distrusted the state. He feared and sought to reduce its power. He did reduce it, wherever the community was strong enough to make an effectual resistance. He had succeeded in his efforts, by the middle of the nineteenth century, in the greater part of the civilized world. He tied the hands of government by written constitutions, when he could, and was careful to declare in these constitutions what he deemed to be his own fundamental inviolable rights."[1] As we have passed from a state of provincial isolation into a state of real national unity, so we have passed from an age of individualism to an age of collectivism. "It is the age of collectivism. The functions of the state multiply. Its circle of activities expands, and the circle of activities around each private individual is correspondingly reduced."[2] Nothing could be more distinct than the paths along which the American people have passed in their progress from provincial isolation to national unity; from an independent individualism to a collectivism corresponding to that now existing in most of the highly civilized nations.

New conception of nationality.

Narrowing circle of individual rights.

The age of collectivism.

The transformations that have thus taken place in the national life of the American people have expressed them-

[1] Chief Justice Simeon E. Baldwin, "The Narrowing Circle of Individual Rights," an address delivered before the Bar Association of West Virginia, December 29, 1908, pp. 2, 3.

[2] Ibid. 9.

selves in no uncertain terms in their constitutions and laws, which are but one though a vitally important aspect of it. As all the world knows, the process of constitutional growth has been aided but little by amendments made through the cumbrous machinery provided by the Constitution itself. During the most important period of growth no successful attempt was made to amend the Constitution at all. Reference is made to the sixty-one years that intervened between the ratification of the Twelfth Amendment, September 25, 1804, and that of the Thirteenth, December 18, 1865. The primary purpose of this chapter will be to outline the death-grapple during that epoch between the old provincial forces, aided by slavery, and the new national forces, aided by the growing power of intercommunication down to the triumph of the latter through the results of the Civil War.

Sixty-one years without a constitutional amendment.

An effort has been made already to demonstrate that only the impending anarchy that threatened the country in 1786–87, with an entire dissolution of the pretense of federal government then existing, enabled the nationalists to force the states to assemble at Philadelphia for the final experiment. So bitter was the opposition in certain quarters that delegates from Rhode Island never appeared at all, while those from the great State of New York were withdrawn at the critical moment through the influence of Clinton, who openly declared that no good was to be expected from the efforts of the advocates of despotism[1] who were proposing to make a new constitution. Such was the spirit of the opposition to the new national system that contested its adoption in all the states under the leadership of such men as Patrick Henry, Richard Henry Lee, and Thomas Nelson, whose efforts might have been successful had it not been for the patriotism of Maryland and South Carolina in refusing to consider the designs of the first-named for an independent Southern confederacy to be based on slavery. And yet, after the triumph of the nationals or federals under the lead of Washington, assisted by his great lieutenants, Madison and Hamilton, it is a comfort to know that even Patrick Henry and Mason acquiesced in the result without

Opposition to new national system.

A Southern confederacy to be based on slavery.

[1] He claimed that after a longer trial the Confederation would be found to answer all the purposes of the Union. *Penn. Packet*, 26th July, 1787.

malignity. They had been beaten down by the master. As Monroe wrote to Jefferson: "Be assured, Washington's influence carried this government."[1] He believed with James Wilson, who said in the Federal Convention of 1787: "By adopting this constitution we shall become a nation; we are not now one. We shall form a national character; we are now too dependent on others."[2]

Washington's triumph.

When the new government was set in motion under the presidency of Washington, with Hamilton, the typical Federalist, as the organizing statesman, assisted by the genius of Madison in the House of Representatives, this country was inferior in population and wealth to Holland; it stood but little above the level of Denmark or Portugal. Its first real assertion of national power was through Hamilton's excise tax on distilled spirits, which was made necessary by the assumption of the state debts. That tax pressed with special severity upon the settlers in the western counties of Pennsylvania and Virginia, who had discovered that it was more profitable to distill their corn and wheat into whiskey than to carry it to market by almost impassable roads. Lying within a disputed district between the two states, these settlers had escaped from vexatious interference from either. When they were prompted by their isolation to set up for themselves, the Supreme Executive Council of Pennsylvania had sent in 1783 a special agent to remonstrate with "those deluded citizens in ye western counties who seemed disposed to separate from ye commonwealth and erect a new and independent state." It is not, therefore, strange that when this direct tax was levied directly upon the distillation of whiskey, these independent and isolated mountaineers, who considered that their industry had been invidiously selected for persecution, should have threatened to take up arms when the revenue officers came to collect it. At the critical moment in 1794, Washington instantly sent an army of sixteen thousand men into the rebellious region, by which the threatened revolt was suppressed. Thus the first demonstration was made that the new government possessed not only the power to levy direct federal taxes but the nerve to trample upon all provincial opposition to their collection.

Hamilton's excise tax.

Whiskey insurrection of 1794.

About this time it was that Washington settled the fact that

[1] July 12, 1788, MS.

[2] *Madison Papers*, ii, 921.

he was to be no less firm in dealing with foreign nations. When in April, 1793, news was received that the French Republic had declared war against Great Britain and Holland, a condition that made it easy for us to drift into war as the ally of France, Washington, despite the opposing current of popular feeling, on April 22, by the unanimous advice of his cabinet, issued a proclamation of neutrality between the French Republic and her enemies. As that act involved the assumption that the former treaty of alliance was really at an end, including its guaranty, by reason of the change of government in France, there was an outburst of rage against the President, who was accused by the Republicans as being not only an enemy of France but of republican institutions. So firmly did he stand his ground that Citizen Genet — who attempted to violate the neutrality of the United States by granting commissions to American citizens to fit out privateers manned by Americans to cruise against English commerce — was recalled. As a recognition of the justice of the President's course the Provisory Council of the French Republic demanded "the arrest of Mr. Genet and all the other agents who may have participated in his faults and sentiments."[1]

Neutrality proclamation of 1793.

John Adams and French Directory.

While a patriotic courtesy prompted Washington to disclaim party affiliations, he was the king of the Federalists, and as such he passed on the new national power to John Adams, who began in 1797 to battle with the French Directory, incensed against this country by reason of its strict neutrality and also by reason of the treaty of peace recently entered into between England and the United States. The burst of indignation that followed the publication of the "X. Y. Z. dispatches" seemed for the moment to overwhelm the Republicans and to bolster up the Federalists, who had been losing ground. In that moment of overconfidence they made the fatal mistake, in the hope of strengthening the government still further, of passing during the summer of 1798 the two acts of Congress, known as the Alien and Sedition Laws, which were distinctly partisan. Intense hostility to France by reason of her aggressions upon American commerce eliminated party divisions for a time and gave over both Houses to Federalist control. As the leading Republican journalists were in the

Alien and Sedition Laws, 1798.

[1] For a full statement see Taylor, *International Pub. Law*, 351–2, 640 *sq.*

main refugee foreigners who had excited their opponents by scurrilous and violent attacks, the Federalists, after providing for an increase of the army and navy, undertook to muzzle these aliens by three alien laws. The essence of the first, an amendment of the naturalization laws, was a substitution of fourteen years' previous residence for five; alien enemies could not become citizens at all; in a register to be kept of all aliens resident in this country their names were to be entered under penalties in case of neglect. The essence of the second, passed June 25, and, limited by its terms to two years, was an authority to the Executive to expel from the country all such aliens as might be deemed dangerous to its peace and safety, or such as might be suspected of treasonable designs against it. The essence of the third was an authority to the Executive, in the event of war or invasion, to apprehend, secure, or remove all resident aliens, natives, or citizens of the hostile nation, upon a proclamation to that effect to be issued at his discretion. Turning then from aliens to native-born citizens, a sedition law was devised to define more exactly the law of treason, and to define and punish the crime of sedition. The practical purpose of this law, which was to expire March 3, 1801, was to fine and imprison such as should combine or conspire to oppose any measure of the Government, and such as should utter any scandalous, false, or malicious writing against the President, Congress, or Government of the United States. In a word, its primary purpose was to advance the interests of the party in power by restraining the freedom of speech and of the press, while enlarging at the same time the scope of the federal judiciary through an implied recognition of its common-law criminal jurisdiction. Under the Sedition Law there were at least six prosecutions; under the Alien Law there were none at all. But it was not so much the oppressive execution of these laws as the principles embodied in them that aroused to action the Republicans, who claimed they were a political weapon directed against them. This tyrannical, and, in part, unconstitutional legislation thus enacted by the Federalists — "who, allowing little for the good sense and spirit of Americans, or our geographical disconnection with France, were crazed with the fear that this Union might be, like Venice, made over to some European potentate, or chained in the same galley with Switz-

Attempt to restrain freedom of discussion.

erland or Holland, to do the Directory's bidding"[1]—drew from the Republicans the counterblasts embodied in the famous Kentucky and Virginia Resolutions of 1798.

Kentucky and Virginia Resolutions, 1798.

In November of that year the Kentucky Legislature passed a series of resolutions formulated by Jefferson, who intrusted them to George Nicholas under a pledge that "it should not be known from what quarter they came." Not until 1821 did the son of the reputed father of the resolutions draw from Jefferson an acknowledgment of their paternity. The first of these resolutions, nine in number, declared in part "that the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of the Constitution of the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." The second declared the Sedition Law "void and of no effect," because Congress possessed no power to punish crimes not mentioned in the Constitution, while the third based the same assertion on the ground that it abridged the freedom of speech and of the press. The fourth, fifth, and sixth attacked the Alien Law on constitutional grounds, while the seventh denounced broad construction in general as "a fit and necessary subject for revisal and correction at a time of greater tranquillity, while those specified in the preceding resolutions call for immediate redress." The eighth and ninth direct the manner of their transmission to federal representatives and to state executives with the warning that, if no action be taken against such unconstitutional exercise of national power, "no rampart now remains against the passions and the power of the majority in Congress."

Additional Kentucky Resolution of 1799.

The additional Kentucky Resolution of 1799, after repeating its definition of the Constitution as "a compact," declares "that the several states which formed that instrument, being sovereign and independent, have the unquestionable right to

[1] Schouler, *Hist. of the U. S.*, i, 411; Randall's *Jefferson*, ii, 444.

judge of its infraction; that a nullification, by those sovereignties, of all unauthorized acts, done under color of that instrument, is the rightful remedy; that, although this commonwealth, as a party to the federal compact, will bow to the laws of the Union, yet it does, at the same time, declare that it will not now or ever hereafter cease to oppose, in a constitutional manner, every attempt, at what quarter soever offered, to violate that compact; and finally, in order that no pretext or arguments may be drawn from a supposed acquiescence, on the part of this commonwealth, in the constitutionality of those laws, and be thereby used as precedents for similar future violations of the federal compact, this commonwealth does now enter against them its solemn protest."

Virginia Resolutions fathered by Madison.

In December of the same year the Virginia Legislature passed a similar series of resolutions, eight in number, substantially identical in thought and feeling, ostensibly prepared by Madison,[1] then a member of that legislature. Passing over the first, declaring the purpose of the legislature to defend the constitutions, federal and state; and the second, professing a firm attachment to the Union, — emphasis should be given to the third, which declared "that this assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government, as resulting from the compact to which the states are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states which are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them." The fourth predicts that broad constitutional construction will end in converting our republican system into "at best a mixed monarchy"; the fifth and sixth denounce the Alien and Sedition Laws as unconstitutional; the seventh expresses

[1] Even when they were in the presidential office both Madison and Monroe looked to Jefferson for intellectual guidance. By the special request of the latter, Jefferson wrote the so-called "Monroe Doctrine." See Taylor, *Int. Public Law*, 141 *sq.*

the affection of Virginia for the other states; the other requests the transmission of the resolutions to federal officials and state executives.

Jefferson the real author of both sets.

How can any critical student fail to perceive, when these two sets of resolutions are placed side by side, that they are the product of a single mind overshadowed by a single thought? No matter what Jefferson's motives were for acting secretly in this grave matter, the fact remains that from behind a mask he offered two phases of a single composition, substantially the same in form and substance, to two legislatures. In Kentucky he acted through George Nicholas; in Virginia through James Madison, whose conduct in the making and adopting of the Constitution clearly indicated that he was then as Federalist as Washington, whose lieutenant he was.[1]

Rousseau and the *Contrat Social.*

No argument is necessary to demonstrate the extent to which Jefferson was imbued with the politics of the French Revolution, whose basic idea was drawn from the social contract theory of Jean Jacques Rousseau. A great critic has said that "Rousseau was more popular than Locke, and more dogmatic than Hobbes. The result was, the *Contrat Social* became one of the most successful and fatal of political impostures."[2] The same writer says that the historical importance of Rousseau's political system "is that it is in great measure answerable for the Declaration of the Rights of Man. . . . The birth of all men free and with equal rights, the collective sovereignty of the nation, and the '*volonté générale*'[3] which positive laws express, are taken straight from Rousseau." The thin veneer of French philosophy superimposed by Jefferson upon the solid substructure of English constitutional law that underlies the Declaration of Independence did no harm, — it was innocuous. But when the time came for him to attempt to embody in our political system, through the Kentucky and Virginia Resolutions, the idea that a constitution is a mere contract or "compact," as viewed by the Rousseau school, it was quite

[1] See Madison's speeches in the Federal Convention, in which he so bitterly opposed the equal representation of the states in the Senate; especially *Madison Papers*, ii, 982, where he says: "The true policy of the small states, therefore, lies in promoting those principles and that form of government which will most approximate the states to the condition of counties."

[2] Sir Frederick Pollock, *Hist. of the Science of Politics*, 75.

[3] Ibid. 79.

another matter. Holland tells us that "since the assertion of the 'rights of man' which preceded the French Revolution, the written enactment of such fundamental principles has not been uncommon, as well on the European continent as in America."[1] But the immense difference that divides a written constitution in the United States from a written constitution in France is embodied in the fact that in the former the supreme and final power to determine when its terms have been infringed is vested in the courts as a function purely judicial. The fundamental heresy embodied by Jefferson in both sets of resolutions — a heresy that had to be burnt out in the fires of civil war — was that over the violation of a constitution, considered as a "compact," there is no common judge. In the Kentucky Resolutions he expresses the idea in these explicit terms: "But that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress." In the third of the Virginia Resolutions the unauthorized exercise of "the powers of the Federal Government as resulting from the compact to which the states are parties" is to be passed upon — not by the Supreme Court of the United States — but by "the states which are parties thereto." There is no mistiness of language, there is no confusion of thought. Jefferson's clean-cut and drastic proposition as embodied in both sets of resolutions was that American written constitutions should be considered only as "compacts" in the French sense, as to whose infractions the courts have no power to judge.

Jefferson's deadly heresy.

Great as Jefferson was, patriotic and wise as he was, the one defect in an otherwise exquisite mind was an utter lack of appreciation of the importance of the judicial power, as a supreme arbitrating power. It may, however, be said in his defense that in 1798 the Supreme Court of the United States was still in eclipse; in 1801 Jay abandoned it on the ground that "it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government."[2] When Jefferson came into power, March 4, 1801, his first move was to direct a systematic and well-organized attack upon the federal judiciary. But a kind provid-

His failure to appreciate the judicial power.

[1] *Jurisprudence*, 362.

[2] See Pellew's *Life of Jay*, 339.

ence so ordered that, just one month before, John Marshall had taken his seat in that high place in which he sat as the chief in the midst of six associates for thirty-four years. Before that great career ended he had uprooted and cast out, so far as the judicial power could uproot and cast out, the fundamental concept, drawn by Jefferson from the politics of the French Revolution, which asserted that the infractions of American constitutions, like those of France, are beyond the jurisdiction of the judicial power.

Nullification and secession.

Out of the Pandora's Box opened by Jefferson in the Kentucky and Virginia Resolutions came the closely related doctrines of nullification and secession which were extinguished once and forever by the Civil War. Mr. Bryce has thus recently summed up the whole matter: "The drily legal and practical character of the Constitution did not prevent the growth of a mass of subtle and, so to speak, scholastic metaphysics regarding the nature of the government it created. The inextricable knots which American lawyers and publicists went on tying, down till 1861, were cut by the sword of the North in the Civil War, and need concern us no longer. It is now admitted that the Union is not a mere compact between commonwealths, dissoluble at pleasure, but an instrument of perpetual efficacy, emanating from the whole people, and alterable by them only in the manner which its own terms prescribe. It is 'an indestructible union of indestructible states.'"[1]

A constitution not "a compact."

The whole system of "scholastic metaphysics regarding the nature of the government," the tying of the "inextricable knots which American lawyers went on tying, down till 1861," all date from the promulgation by Jefferson in 1798 of the purely fanciful theory that an American constitution is a "compact" in the French sense, and as such beyond the jurisdiction of the supreme judicial power, — and not "an instrument of perpetual efficacy" construable by that power. Upon that indefensible word "compact" were based all of the subtle and untenable theories embodied in the "scholastic metaphysics" of Calhoun.

Marshall's doctrine.

Marshall clearly taught that an American constitution is not a "compact" but "an instrument of perpetual efficacy," when in McCulloch *v.* Maryland,[2] he held that the government of the Union is a government of the peo-

[1] *American Commonwealth*, i, 322–323. [2] 4 Wheat. 316.

ple, emanating from them, and deriving its powers from them. Though limited in its powers, it is supreme within its sphere, and its laws are the supreme law of the land. In that case he said: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." In his view all such deductions were to be made by the judicial power. The good work thus begun by Marshall was completed when, in Texas *v.* White,[1] Chief Justice Chase declared, after the close of the Civil War, that in the Constitution of the United States is embodied "an indestructible union of indestructible states." If we had accepted from the outset those sane and legitimate definitions of a constitution as laid down by Marshall and Chase, the untenable assumption that a constitution is a "compact" — the outcome of the now entirely discredited theory of the social contract, which passed from Hobbes to Rousseau and from Rousseau to Jefferson — could never have entered the arena of American politics with its long train of false and misleading analogies.

Chase's doctrine.

While declining the moral responsibility for it at the time, Jefferson undertook to carry on a political propaganda through the resolutions in question, which were transmitted to all representatives in Congress and to the other states, with the view of eliciting sympathetic responses. The only responses actually made were sharply antagonistic to the resolutions. Such was the nature of the replies made by Delaware, February 1, 1799, by Rhode Island in February, by Massachusetts, February 9, by New York, March 5, by Connecticut, May 9, by New Hampshire, June 14, by Vermont, October 30. Massachusetts, in a long and argumentative response, took special pains to deny the competency of any state legislature "to judge of the acts and measures of the Federal Government."[2]

Jefferson's evasion of moral responsibility.

[1] 7 Wall. 700.

[2] Cf. Johnston, *American Political History*, 1763–1876, part i, p. 189.

Hartford Convention, 1814.

Just as the conflict with France in 1798 led to the controversy between the national and provincial forces out of which grew the Southern manifesto embodied in the Kentucky and Virginia Resolutions of that year, so the conflict with Great Britain in 1812, for the establishment of neutral rights, led to the controversy between the same forces out of which grew the Northern manifesto embodied in the proceedings of the convention that met at Hartford in 1814. As early as 1781 the name "Essex Junto" was applied by John Hancock to a group of leaders centred in Essex County, Massachusetts, who were specially obnoxious to the Anti-Federalists of that state because they were impelled as representatives of commercial interests to desire a stronger federal government. Nothing was more natural than that this group, after the adoption of the Constitution, should have become an important factor in the Federal party as directed by Washington and Hamilton. After the accession of Adams, the junto, which allied itself rather with Hamilton than with the President, so far incurred his hostility that he stigmatized them as a "British faction," unworthy of American recognition because, as he alleged, they were chiefly responsible for the attempt to force war upon France in 1798–99.

New England opposition to "restrictive system."

As in this group was embodied in a pronounced form the New England opposition to the "restrictive system," it became convenient in the rest of the Union, almost entirely Republican in politics, to attribute all the evils arising out of the resistance to the Embargo, the alleged intention to secede in 1808, and the determined opposition to the war with Great Britain to that local type of New England Federalism which the evil spirit of the "Essex Junto" was supposed to have produced. In 1812 only in New England did the Federal party still maintain an organization as such, — the administration of the government being in the hands of the Democratic-Republicans, representing a coalition of the South and West, intent upon war and an invasion of Canada in order to compel Great Britain to give up the right of imprisonment, search, and paper blockade.

Federalist opposition to War of 1812.

Against the war declared by the Act of June 18, the Federalists were unanimously opposed, because, as they contended, while French aggressions had never really ceased, the effects

of the British Orders in Council were not sufficiently damaging to American trade to warrant the destruction of what remained of it on that account. Out of that spirit of hostility to the war grew the contention of the governors of Connecticut and Massachusetts that they were required by law to furnish troops only to suppress insurrections, or repel invasions, when, on June 12, the President called upon them to supply detachments of militia for garrison duty. The disposition thus manifested in New England to construe strictly and to resist the powers of the Federal Government met with such popular approval there that in 1813 the Federal party won a majority in every state election; and when the Congress met in May the House — the New York delegation having become largely Federalist — contained 68 peace to 112 war members. Thus emboldened by success, the legislature of Massachusetts declared the war "impolitic and unjust," even going so far as to refuse votes of thanks for naval victories "not immediately connected with the defense of our seacoast and soil."

Massachusetts storm centre.

From Massachusetts the spirit of opposition to the war passed to all New England, then suffering from a combination of grievances, chief among which was the Embargo enacted to counteract the British exemption of that coast, whose defense had been neglected, from blockade, and the destruction of its commerce and fisheries, for which infant manufactures and privateering were not an adequate substitute. When under such conditions the Massachusetts Legislature, on October 18, 1814, accepted the proposal of a convention of the New England States to "lay the foundation of a radical reform in the national compact by inviting to a future convention a deputation from all the other states in the Union," Connecticut and Rhode Island promptly followed her lead, — the first-named with the proviso that the deliberations were to be limited to matters "not repugnant to their obligations as members of the Union," a qualification restated in substance by the other two.

Convention at Hartford, Dec. 15, 1814.

On December 15, the convention met at Hartford, with twelve delegates from Massachusetts, seven from Connecticut and four from Rhode Island, two from New Hampshire and one from Vermont. After secret session of three weeks

the twenty-six delegates prepared a report to their respective legislatures and adjourned January 15, 1815. On November 16, 1819, the president, George Cabot, deposited its journal with the Secretary of State at Boston, and in 1833 the history of the Hartford Convention was written by its secretary, Theodore Dwight, editor of the "Hartford Union." With the sources of information thus available, there is now no mystery as to the scope of what was actually undertaken. So redolent is the report of the aroma of the Kentucky and Virginia Resolutions that it is hard to forget for the moment that they were not a New England product. In the proposal for the meeting the Constitution is called "the national compact," which is not to be dissolved, unless such a dissolution should be necessary "by reason of the multiplied abuses of bad administrations; it should, if possible, be the work of peaceable times and deliberate consent." It gravely proposed that Congress should confide to the states their own defense, a certain proportion of the taxes raised in the respective states to be paid into the state treasuries for that purpose. With that proposal was coupled the declaration that "it is as much the duty of the state authorities to watch over the rights reserved as of the United States to exercise the powers which are delegated." One can almost hear in these words the voice of Jefferson repeating that when there has been an exercise of federal powers not granted "by the said compact, the states, which are parties thereto, have the right, and are in duty bound to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them."

Scope of its work.

The voice of Jefferson.

In addition to the New England grievances already mentioned, the report referred to "the easy admission of naturalized foreigners to places of trust, honor, and profit," and to "the admission of new states formed at pleasure in the Western regions" by which the original balance of the sections was destroyed. Extreme measures were not, however, to be taken, the Union was not to be broken up, if the following changes in the Constitution, which it recommended, should be made. In the first place the three-fifths rule regulating the representation of slaves should be abolished; in the second, no new state should be admitted without a two-thirds vote of both Houses;

Changes in Constitution recommended.

in the third, embargoes should be limited to sixty days; in the fourth, commercial intercourse should only be prohibited by a two-thirds vote of both Houses; in the fifth, such a vote should be required to declare war or authorize hostilities, except in case of invasion; in the sixth, naturalized foreigners should be excluded from Congress and from all civil offices under the Federal Government; in the seventh, the President should not be reëligible, and should not be taken from the same state two terms in succession. Before the arrival of the commissioners sent by the legislatures of Massachusetts and Connecticut to Washington to urge the proposed amendments, this grave design against the Union was annihilated by Jackson's brilliant victory at New Orleans which resulted in an honorable peace with England. As an eminent historian has graphically expressed it: "The commissioners found themselves only the discredited agents of a meeting of secret conspirators against the unity of the Republic, and of states that had deserted their country in its hour of sorest need. No attention was paid to their recommendations, nor was any renewal of the convention ever attempted." [1]

How the conspiracy was annihilated.

Daniel Webster, in the course of his great debate with Hayne upon the subject of nullification, in demonstrating what the South Carolina doctrine would have accomplished in New England if it had been acted upon by the Hartford Convention, said: "Let me here say, sir, that, if the gentleman's doctrine had been received and acted upon in New England in the times of the embargo and non-intercourse, we should probably not now have been here. The government would, very likely, have gone to pieces, and crumbled into dust. No stronger case can ever arise than existed under these laws; no states can ever entertain a clearer conviction than the New England States then entertained; and if they had been under the influence of that heresy of opinion, as I must call it, which the honorable member espouses, this Union would, in all probability, have been scattered to the four winds. I ask the gentleman, therefore, to apply his principles to that case; I ask him to come forth and declare, whether, in his opinion, the New England States would have been justified in interfering to break up the embargo system, under the conscientious

Daniel Webster's comment.

[1] Johnston, *Am. Polit. Hist.*, 1763–1876, part i, p. 316. See also p. 308 *sq.*

opinions which they held upon it? Had they a right to annul the law?" [1]

South Carolina and nullification.

The same warrior-statesman, who checked in 1814 by his triumph in the field a provincial and selfish movement in New England down the path toward disunion, checked in 1832 just such a movement when South Carolina attempted to follow the same path under the banner of nullification. While the South did not oppose the protective tariff of 1816, so favorable to the sale of her cotton, she did oppose as time went on any further increase of duties on foreign goods, the Southern element in Congress defeating in 1822 a proposal to make the tariff more protective. The tariff of 1824, more advanced in its purpose than any other to exclude from American markets foreign competing goods, was passed by a small majority of Northern members opposed by the almost unanimous vote of the Southern, who claimed that it was not only unjust and sectional but unconstitutional. From that time the tariff question became political, dividing Whigs from Democrats about equally; and also sectional, uniting the West, Centre, and East against the solid South, except Louisiana. In 1824 Calhoun and Jackson voted for the last time for protection; and in that year Webster made his last speech for free trade. The tariff of 1828 marks an era in the history of our economic legislation. From that time dates the serious division between the North and the South, out of which emerged the doctrine of nullification, defined to be the formal suspension by a state of the operation of a federal law within its jurisdiction. The application of that doctrine to practical politics was first made by John C. Calhoun, then the ablest and most influential statesman of the South, born in South Carolina in 1782, of Irish-Presbyterian parentage. Although high-thoughted, gifted, and cultured, his mind was overmastered by "a mass of subtle and, so to speak, scholastic metaphysics regarding the nature of the government it [the Constitution] created." It is hardly conceivable that the heresy of nullification could have emanated from a mind with an inborn genius for law. Such a mind was that of Daniel Webster, who, in the famous debate with Hayne, — the spokesman of Calhoun, then President of the Senate, — in the winter of 1829–30, thus restated in that body

Tariff a political issue after 1824.

Calhoun.

[1] Benton's *Thirty Years' View*, 139.

Nullification defined by Webster.

the doctrine in question as he understood it: "I understand the honorable gentleman from South Carolina to maintain, that it is a right of the state legislature to interfere, whenever, in their judgment, this government transcends its constitutional limits, and to arrest the operation of its laws. I understand him to maintain this right, as a right existing under the Constitution; not as a right to overthrow it, on the ground of extreme necessity, such as would justify violent revolution. I understand him to maintain an authority, on the part of the states, thus to interfere, for the purpose of correcting the exercise of power by the general government, of checking it, and of compelling it to conform to their opinion of the extent of its powers. I understand him to maintain that the ultimate power of judging of the constitutional extent of its own authority is not lodged exclusively in the general government, or any branch of it; but that on the contrary, the states may lawfully decide for themselves, and each state for itself, whether, in a given case, the act of the general government transcends its power. I understand him to insist that, if the exigency of the case, in the opinion of any state government, require it, such state government may, by its own sovereign authority, annul an act of the general government, which it deems plainly and palpably unconstitutional." [1]

Hayne's defense based on Virginia Resolutions.

When Hayne attempted to answer, without accepting or rejecting Webster's definition, he admitted the parentage of nullification by resting it upon the third resolve of the Virginia Resolutions of 1798, reaffirmed in 1799. Thus out of the Pandora's Box, opened by Jefferson in the Kentucky and Virginia Resolutions, came first the Hartford Convention, and next the doctrine of nullification, which proposed to transfer the final arbitrating power from the federal judiciary to any state that might see fit to constitute itself the ultimate judge. In other words, the doctrine was that whenever a state believed that its agent, the Federal Government, had unlawfully executed a power delegated to it, it was its constitutional right to suspend the exercise of that power, even after it had crystallized into a statute, until such time as the power in question should be properly exercised. Such seems to have been Calhoun's thought — deemed by Alexander H. Stephens "too

Calhoun's "too subtle" restatement.

[1] Benton's *Thirty Years' View*, 138–139.

subtle" for common comprehension — when in February, 1833, he said: "It is a gross error to confound the exercise of sovereign power with *sovereignty* itself or the *delegation* of such powers with the *surrender* of them. A sovereign may delegate his powers to be exercised by as many agents as he may think proper, under such conditions and with such limitations as he may impose; but to surrender any portion of his sovereignty to another is to annihilate the whole."

Banquet of April 13, 1830, Jackson and Calhoun.

The metaphysical brain-child which Hayne had sworn to Jefferson was taken to a great feast given at Washington April 13, 1830, in honor of his birthday, celebrated by a company at whose head sat the President, Andrew Jackson, and the Vice-President, John C. Calhoun. These gladiators, who had once been close friends, drew their swords when, at the end of the twenty-four regular toasts, all devised in the interest of nullification, President Jackson offered the famous one, "Our Federal Union; it must be preserved," — to which Calhoun replied, "The Union, next to our liberty the most dear; may we all remember that it can only be preserved by respecting the rights of the states, and distributing equally the benefit and the burden of the Union."[1] The issue was thus clearly made up between the supremacy of the Union and the supremacy of any state that might see fit to challenge its ultimate authority. Benton, who was present at the dinner, speaks thus of Calhoun's toast: "This toast touched all the tender parts of the new question — liberty *before* union — *only* to be preserved — *state rights* — inequality of *burdens and benefits*. These phrases, connecting themselves with Mr. Hayne's speech, and with proceedings and publications in South Carolina, unveiled *Nullification* as a new and distinct doctrine in the United States, with Mr. Calhoun for its apostle, and a new party in the field of which he was the leader. The proceedings of the day put an end to all doubt about the justice of Mr. Webster's grand peroration, and revealed to the public mind the fact of an actual design tending to dissolve

Benton's comment.

[1] Benton says: "I soon discovered what it was — that it came from the promulgation of twenty-four regular toasts, which savored of the new doctrine of nullification; and which, acting on some previous misgivings, began to spread the feeling, that the dinner was got up to inaugurate that doctrine, and to make Mr. Jefferson its father." *Thirty Years' View*, 148.

the Union." In the peroration referred to, Webster had said in replying to Hayne: "When my eyes shall be turned to behold, for the last time, the sun in heaven, may I not see him shining on the broken and dishonored fragments of our once glorious Union; on states dissevered, discordant, belligerent; on a land rent with civil feuds, or drenched, it may be, in fraternal blood." Such was Webster's prophetic vision of the Civil War in which his son perished in defense of the Union.

Calhoun's dissertation of July, 1831.

Despite the fact that nullification had found a lion in its path in the person of Andrew Jackson, Calhoun persisted, publishing in July, 1831, in a South Carolina newspaper, a dissertation upon it, in which, after justifying its expediency and constitutionality, he contended that unless Congress at its approaching session should eliminate the protective features of the tariff, South Carolina should force the issue by nullifying the law through a refusal to permit the collection of duties within the state. Such was the prelude to Clay's tariff bill which became law, July 14, 1832, not to take effect, however, until March 3, 1833. In the October following its passage the legislature of South Carolina was convened for the purpose of calling a state convention, which passed, November 24, an ordinance of nullification, declaring the tariff acts of 1828 and 1832 to be null and void, and not binding on the state, its citizens, or officers; prohibiting the payment of duties under either act within the state after February 1, 1833, and making any appeal to the Supreme Court of the United States as to the validity of the ordinance a contempt of the state court from which the appeal was taken. As the ordinance gave warning that South Carolina would proceed forthwith to organize a separate government if the federal power should attempt to use the army or navy or should by closing the ports of the state obstruct in any way its foreign commerce, the President had, on November 6, 1832, instructed the collector at Charleston to provide as many boats and inspectors as might be necessary to seize every vessel entering the port and keep it in custody until the duties should be paid, — "to retain and defend the custody of the said vessel against any forcible attempt," and to refuse to obey the legal process of state courts designed to remove the vessel from his custody. After ordering General Scott to Charleston to support the collector,

Nullification ordinance of November, 1832.

and sending a naval force to the harbors of the state, the President, on December 11, issued his "Nullification Proclamation," in which he warned the people of South Carolina in these clear and unmistakable terms: "The dictates of a high duty oblige me solemnly to announce that you cannot succeed. The laws of the United States must be executed. I have no discretionary power on the subject — my duty is emphatically pronounced in the Constitution. Those who told you that you might peaceably prevent their execution deceived you — they could not have been deceived themselves. Their object is disunion, and disunion by armed force is treason. Are you ready to incur its guilt? If you are, on your unhappy state will fall all the evils of the conflict you force upon the government of your country."

Nullification Proclamation of Dec. 11.

After that matchless utterance, so full of moral dignity, Congress strengthened the President's hands by the Act of March 2, 1833, empowering him to alter or abolish revenue districts, to remove custom-houses, and to use the land and naval forces for the protection of the revenue officers against attempts to recover property by force. Under these conditions the federal revenue was collected as usual after February 1, 1833, despite the anathemas of the ordinance of nullification. A private "meeting of leading nullifiers" had decided at Charleston in January that the enforcement of the ordinance should be suspended until after the adjournment of Congress. Thus it appears that the power of suspending a federal statute had first been assumed by a state convention; and then its organic act was suspended by a meeting of private citizens! Such was the result brought about through the indomitable courage of the President in upholding the supremacy of the national authority. Jackson was, however, thoroughly in favor of a revision of the tariff in the direction claimed by the nullifiers; and the result was the Clay compromise tariff bill, whose signature by the President on March 2, 1833, was followed by the repeal of the ordinance of nullification by the South Carolina Convention, on March 16. South Carolina thus succeeded in bringing about a concession that secured to the country a progressively less protectionist tariff for the next nine years.

Act of March 2, 1833.

Compromise tariff of March 2, 1833.

The doctrine of nullification, put forward as the extremest possible assertion of state sovereignty, should not be confused

with the doctrine of secession subsequently employed as a weapon for the defense of slavery. While both doctrines were drawn from a common source, the logical processes by which they were defended were entirely different. Admitting Calhoun's fundamental concept that a constitution is "a compact" of the Hobbes-Rousseau type, his deduction that while the compact was still undissolved a law enacted under its authority could be annulled by one of its subscribing members was a palpable *non-sequitur*. With no logical consistency could it be contended that a state could remain in the Union, enjoying all its benefits, and at the same time nullify its laws at pleasure. So palpable was that difficulty that when the tariff of 1842 was enacted neither Calhoun nor any one else ever suggested a revival of that hopeless expedient. But when the time came to put forward the doctrine of secession as a means of dissolving the Union, that contention assumed a more formidable aspect. If the premise upon which that doctrine rested was once conceded, the conclusion was irresistible. If it was true, as Calhoun contended, that a constitution was merely a compact, and not "an instrument of perpetual efficacy," as it is now understood to be, then it was hard to deny that it was not dissolvable at pleasure. The entire argument in favor of secession depended alone upon the soundness of the premise upon which Calhoun rested it.

The doctrine of secession.

Nullification abandoned.

Within the last fifty or sixty years the Historical School of Jurisprudence has been able to explain to all students of government and law what a constitution really is. The conclusion that it is "an instrument of perpetual efficacy" and not a mere "compact" is the ripe fruit of that teaching. The now exploded and discredited theory of the *contrat social* popularized by Rousseau rested upon the assumption that men in a state of nature were independent and isolated individual units with the power to enter into contracts or compacts with each other. Out of such a condition of things social organization was supposed to have arisen. The Historical School has demonstrated long ago that at the beginning of social organization there were no independent individual units capable of contracting with each other; on the contrary the individual was then swallowed up in a family corporation under the despotic government of a patriarchal chief, who was at once general, priest, and law-

A constitution an instrument of perpetual efficacy.

giver. At the outset the individual as such did not exist at all.[1] The historical importance of Rousseau's political theory of the social contract is embodied in the fact that it is mainly answerable for the Declaration of the Rights of Man,[2] sound in many particulars, which, at an early stage of the French Revolution, asserted among other things that all men are born and continue free and equal in rights; that society is an association of men to preserve the natural rights of men; that the law can forbid only such actions as are mischievous to society; that law must be reasonable; it must have no retroactive force; a society, the rights of which are not assured, the powers of which are not definitely distributed, has no constitution.

Declaration of the Rights of Man.

As Jefferson was in France at the time the Federal Convention of 1787 was in session, it was not in his power to infuse into its proceedings the French political theories with which he had veneered a part of the Declaration of Independence. Not until the time came for him to draft the Kentucky and Virginia Resolutions did it become possible for him to pour into the stream of American political thought the ideas he had derived from Rousseau. From 1798 down to the beginning of the Civil War every discontented section or faction that desired to revolt against the national authority went to the fountain thus opened for arguments to justify the contention that those who were ill-used within the Union had the right to cancel the "compact" and to withdraw from it. The drafts thus made on the common source were absolutely non-sectional. As the pressure of the national authority fell first upon New England, it was that section that first threatened to employ what was for a long time considered as an obvious method of redress. It was at a comparatively late day that the South was tempted to use the doctrine of secession as a weapon with which to defend slavery. So long as there was a chance for that section to preserve the ascendancy of the slave power through the admission of new states, its ambition was to remain within the Union and dominate it. Never, until that battle was lost by the exhaustion of slave territory through the admission of Florida and Texas in 1845, was the South prompted to appeal

Influence of Kentucky and Virginia Resolutions.

[1] Cf. Maine, *Village Communities*, 15 *sq.*

[2] For the full text of that document see Henri Martin's *Histoire de la France depuis 1779*, i, 78.

to the right of secession as a means of defending its special institution.

Doctrine of secession first defined about 1795.

It is said that the doctrine of secession was first defined in print in a series of articles that appeared in the Connecticut "Courant" soon after 1795, containing a declaration of "the impossibility of union for any long period in the future," coupled with the assurance that "there can be no safety to the Northern States without a separation from the Confederacy," — a New England apprehension quieted by the election of Adams in 1796. Five months before the Kentucky Resolutions were introduced, Jefferson, in a letter to John Taylor of Caroline, dated June 1, 1798, after tacitly assuming that the right of secession existed, thus expressed himself as to the expediency of its exercise: "If, on a temporary superiority of one party, the other is to resort to a scission of the Union, no federal government can ever exist. If, to rid ourselves of the present rule of Massachusetts and Connecticut, we break the Union, will the evil stop there? Suppose the New England States alone cut off, will our natures be changed? Are we not men still to the south of that, with all the passions of men? . . . Seeing that we must have somebody to quarrel with, I had rather keep our New England associates for that purpose."

Jefferson's view of it in 1798.

From that quarter came a very decided counterblast when the Federalists of New England, alarmed by the victory won by the South in the acquisition of Louisiana, began to see visions of six, nine, or even a dozen new states built up by "the wild men on the Missouri." Not, however, until January, 1811, when the enabling act for the admission of Louisiana was actually before the House, did Quincy of Massachusetts venture to declare: "It is my deliberate opinion, that, if this bill passes, the bonds of this Union are virtually dissolved; that the states which compose it are free from their moral obligations; and that, as it will be the right of all, so it will be the duty of some, to prepare definitely for a separation, amicably if they can, violently if they must." No matter whether a project of secession was actually mooted in Massachusetts in 1803 or not, certain it is that the movement in that direction at a little later day was sufficiently pronounced to prompt Justice Story to write on January 9, 1809: "I am sorry to perceive the spirit of disaffection in Massachusetts increasing to so high a degree;

Quincy's outcry in 1811.

Story and Henry in 1809.

and I fear that it is stimulated by a desire, in a few ambitious men, to dissolve the Union." John Henry, who had been sent by Craig, governor of British North America, to report upon the state of affairs and political feeling in the New England States, reported in his letter of March 7, 1809, describing the Federalist programme, that, in the event of war, "the legislature of Massachusetts will declare itself permanent until a new election of members; invite a congress, to be composed of delegates from the Federal States; and erect a separate government for their common defense and common interest."

Hartford Convention, 1814.

The Hartford Convention, as we are informed by its report, dealt with the question in 1814, in this wise: "If the Union be destined to dissolution, by reason of the multiplied abuses of bad administrations, it should, if possible, be the work of peaceable times and deliberate consent. Some new form of Confederacy should be substituted among those states which shall intend to maintain a federal relation to each other. But, a severance of the Union by one or more states, against the will of the rest, especially in time of war, can be justified only by absolute necessity." The same general idea had been expressed by Tucker of Virginia in his edition of Blackstone in 1803, in which, after declaring the Federal Government to be only "the organ through which the united republics communicated with foreign nations and with each other," he said: "Each is still a perfect state, still sovereign, still independent, and still capable, should the occasion require, to resume the exercise of its functions, as such, to the most unlimited extent. But, until the time shall arrive when the occasion requires a resumption of the rights of sovereignty by the several states (and far be that period removed when it shall happen), the exercise of the rights of sovereignty by the states individually is wholly suspended or discontinued, in the cases before mentioned; nor can that suspension ever be removed, so long as the present Constitution remains unchanged, but by the dissolution of the bonds of union." In 1825 a doctrinaire from the North, Judge Rawle, of Pennsylvania, in his well-known "Commentaries on the Constitution," said: "The secession of a state from the Union depends on the will of the people of such state. . . . The state legislatures have only to perform certain organical operations in respect to it. To withdraw from

Tucker's Blackstone, 1803.

Judge Rawle, 1825.

the Union comes not within the general scope of their delegated authority. But in any manner by which a secession is to take place, nothing is more certain than that the act should be deliberate, clear, and unequivocal; and in such case the previous ligament with the Union would be legitimately and fairly destroyed."

Persistency of the idea that a constitution is a "compact."

It is impossible to review these early declarations upon the subject of secession, put forth before the existence of the nation was clearly recognized, without perceiving, first, that the fact that the old Confederacy had been superseded by a National Government with a real Constitution acting directly on the citizen was not then clearly understood; second, that the fact that a national constitution is not a "compact" but "an instrument of perpetual efficacy," construable by the judicial power, was not at all understood. Now that the conception of a constitution as "a compact," born of the politics of the French Revolution, has passed forever away, it is difficult to realize how completely it dominated a very large class of our political thinkers for nearly seventy years. With them it was a living, tangible reality. It slowly died out, as thinking men perceived that it was impracticable. Jefferson, who never deceived himself, summed up that aspect of the matter when he said: "If we reduce our Union to Virginia and North Carolina, they will end by breaking into their simple units." As the growth of the national life advanced through the power of intercommunication, the possibility of its dissolving into its original units became more and more abhorrent. There was but one counterforce to keep the old idea alive, and that was the necessity for its use as a weapon with which to defend slavery. After that incentive was removed by the destruction of slavery in the Civil War, nothing whatever remained to support it. After it had thus died a natural death, the Historical School completed its demonstration that the whole social contract theory, out of which arose the idea that a constitution is a "compact," was "one of the most successful and fatal of political impostures"; that at the beginning of society men were in a condition the very opposite of that in which Hobbes and Rousseau assumed them to be.

Extinguished by growth of national life.

Antecedents of doctrine taken up by Calhoun in 1847.

And yet the fact remains that when in 1847 Calhoun took up the doctrine of secession as a weapon with which to defend

slavery, he found it established and popularized by fifty years of preceding American history. During that time it had been used as a menace by every provincial minority discontented with the exercise of the growing national authority. Nowhere had it been so persistently or so aggressively used as in New England, where its popularity had not diminished down to that time. Only two years before, in 1845, William Lloyd Garrison, at an anti-annexation convention in Boston, had demanded the calling of a Massachusetts convention to declare the Union dissolved, and to invite other states to join with her in a new union to be based on the principles of the Declaration of Independence. From May's "Anti-Slavery Conflict"[1] we learn that "although his motion was not carried by the convention it was received with great favor by a large portion of the members and other auditors, and he sat down amidst the most hearty bursts of applause."

Garrison's use of it in 1845.

As we have seen already, the South's first grievance against the Union grew out of protective tariffs, which her statesmen denounced as legalized robbery. Against that grievance South Carolina made an unsuccessful battle alone, under the banner of nullification, not involving the question of slavery at all. Not until the South clearly foresaw that she was to lose control of the Federal Government, through the more rapid growth of free than slave states, did the doctrine of secession really become a part of her policy. The last slave territory was annexed with the admission of Florida and Texas in 1845, and in 1847 Calhoun made his move for "coöperation" of the slave states upon a certain basis,[2] which, though unsuccessful, paved the way for a bolder programme in 1850, which proposed the joint secession of a number of slave states, for mutual defense, in the event that any prohibition of slavery in the new territories should be insisted upon. While at that time the Southern States adhered to the resolve of the Georgia State Convention of 1850 to accept the compromise of that year, they were probably prepared to resist, even to the point of secession, such anti-slavery legislation as involved the abolition of slavery

Calhoun's move for co-operation in 1847.

[1] Page 320. See also Johnston, *American Political History, 1763–1876*, part ii, pp. 280–311.

[2] The slave states were to be asked to coöperate in an interstate embargo system designed to detach from the Eastern States the Northwest, in the hope that that section would unite with the South in opening the new territories to slavery.

in the Territories, or in the District of Columbia, or of the interstate slave trade. But long before that point had been reached, the question of questions — is the Constitution a "compact," dissolvable at pleasure by any state that sees fit to withdraw from it? — had been thrashed out on the floor of the Senate by Webster and Calhoun. With the lights now before us it is hard to comprehend how the latter could have ventured to assume that the entirely new conception of a federal government embodied in the unique creation of 1787, operating directly on the citizen, had really wrought no change in our condition; that after its adoption the Constitution was still nothing more than the loose league that had preceded it. His attitude in that regard has thus been stated by a very recent biographer: "The generalizations of the 'Disquisition on Government' Calhoun made immediately applicable in his 'Discourse on the Constitution and Government of the United States.' 'Ours,' it says, 'is a democratic federal republic,' — democratic, because the people are the source of all power, — federal, because it is 'the government of a community of states, and not the government of a single state or nation.' Under the Constitution the states should be as free, independent, and sovereign, as they were under the Articles of Confederation."[1] Upon that assumption, historically as unsound perhaps as any one that could have been devised, Calhoun based his famous nullification resolutions of January 22, 1833, in which he contended "that the people of the several states composing these United States are united as parties to a constitutional compact, to which the people of each state acceded as a separate sovereign community, each binding itself by its own particular ratification; and that the Union, of which the said compact is the bond, is a union between the states ratifying the same; . . . that whenever the general government assumes the exercise of powers not delegated by the compact, its acts are unauthorized, and are of no effect; and that the same government is not made the final judge of the powers delegated to it, since that would make its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among sovereign parties, without any common judge, each has an equal right to judge

His view of the Constitution.

His resolutions of January 22, 1833.

[1] Gaillard Hunt's *Calhoun*, 96.

for itself, as well of the infraction as of the mode and measure of redress."[1] Here we have in all its baldness, with almost an identity of language, the theory of a constitution as a dissolvable compact, entirely beyond the arbitrating power of the judiciary, as Jefferson, who had taken it from Rousseau and his school, had restated it in the Kentucky and Virginia Resolutions of 1798. Calhoun, who was a master of "scholastic metaphysics," and far more of a political dreamer of the Rousseau type than Jefferson, entered with the sincere enthusiasm of a devotee into every shadowy subtlety his position involved when, on February 15, he spoke in favor of his resolutions. In closing, he challenged the opponents of his doctrines to disprove them, warning them, in his concluding sentence, that the principles they might advance would be subjected to revision by posterity. Long ago posterity has given its approval to the opposing theory of a constitution embodied in the crushing reply in which Webster declared: "1. That the Constitution of the United States is not a league, confederacy, or compact, between the people of the several states in their sovereign capacities; but a government proper, founded on the adoption of the people, and creating direct relations between itself and individuals. 2. That no state authority has power to dissolve these relations; that nothing can dissolve them but revolution; and that, consequently, there can be no such thing as secession without revolution. 3. That there is a supreme law, consisting of the Constitution of the United States, and acts of Congress passed in pursuance of it, and treaties; and that, in cases not capable of assuming the character of a suit in law or equity, Congress must judge of, and finally interpret, this supreme law so often as it has occasion to pass acts of legislation; and in cases capable of assuming, and actually assuming, the character of a suit, the Supreme Court of the United States is the final interpreter."[2] Each persevered in his contention to the end. Calhoun in his last speech in the Senate, March 4, 1850, said: "If you who represent the stronger portion, cannot agree to settle the great questions at issue on the broad principle of justice and duty, say so; and let the states we both represent agree to separate

His famous speech of February 15.

Webster's reply.

Calhoun's last speech, March 4, 1850.

[1] See Benton's *Thirty Years' View*, 334.

[2] Webster's *Writings and Speeches*, vi, 180–198.

and depart in peace. If you are unwilling we should part in peace, tell us so, and we shall know what to do." Three days later Webster exclaimed: "Secession! Peaceable secession! Sir, your eyes and mine are never destined to see that miracle. The dismemberment of this vast country without convulsion! The breaking up of the fountains of the great deep without ruffling the surface! Peaceable secession is an utter impossibility." Thus was made up the issue finally submitted to the arbitrament of Civil War.

Two revolutionary movements.

Clear as it is that secession as a means of dissolving the Union was an extra-constitutional remedy, absolutely incompatible with the nature of "an instrument of perpetual efficacy" whose interpretation belongs to the judicial power, it is clearer still that the conduct of all who refused to abide by the judgment of the Supreme Court in the Dred Scott case was purely revolutionary. No successful assault can ever be made upon Webster's proposition that "in cases capable of assuming, and actually assuming, the character of a suit, the Supreme Court of the United States is the final interpreter." The status of a slave in Illinois, where slavery was prohibited by statute, and in Wisconsin, where slavery was prohibited by the Missouri Compromise, was an ideal question for solution in a suit, and in that form it was presented with all technical accuracy in the case of Dred Scott, so exhaustively argued. The authority of every court of last resort rests necessarily upon the fundamental postulate that it alone is the judge of the scope of its jurisdiction, — its highest duty is to determine what questions are before it. In the words of Marshall, C. J., in Cohens *v.* Virginia,[1] "It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution." It is not likely that any jurist familiar with the practice of the Supreme Court would have seriously contended, in times free from political excitement, that the constitutionality of the Missouri Compromise, involving the entire status of slavery in the territories, was not squarely before that Court on the pleadings in the Dred Scott

Authority of a court of last resort.

Its exclusive right to define its jurisdiction.

[1] 6 Wheat. 264.

case. However that may be, the Court so held, and that decision was conclusive upon all persons bound to respect the Court's authority.

The vital fact the judgment revealed was that the real difficulty was imbedded in the Constitution itself, whose compromises upheld property in a slave in the territories as a matter of positive law. When the political leaders of the North were brought face to face with that result, let it be said to their honor that they made war directly upon the Constitution itself,—they did so by rejecting the exposition of the positive law as made by the Supreme Court within the scope of its authority. Their own declarations put that assertion beyond all controversy. In 1858, the year following the decision, Lincoln said: "This government cannot endure permanently half slave and half free. I do not expect the Union to be dissolved; I do not expect the house to fall; but I do expect that it will cease to be divided. It will become all one thing or the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind will rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward till it shall become alike lawful in all the states, old as well as new, north as well as south." Whatever doubt remained after that utterance it was removed completely by Seward's famous "irrepressible conflict" speech made at Rochester in the following October, in which he declared that the conflict in which the country was then engaged was not "accidental or unnecessary, the work of interested or fanatical agitators. It is an irrepressible conflict between opposing and enduring forces, and it means that the United States must and will, sooner or later, become either entirely a slaveholding nation, or entirely a free-labor nation." Seward's appeal to "the higher law" was a declaration that the Constitution of the United States, as construed by the Supreme Court, was no longer to be accepted as such. The higher law to which he referred was that consensus in favor of the abolition of slavery between the civilized nations which swept the institution out of existence in this country through civil war, despite the express guarantees given to the contrary by the Constitution of the United States. In the light of these facts a jurist who sits in the "unvexed silence of a

Lincoln's declaration, 1858.

Seward's "irrepressible conflict."

Collision of unlawful forces.

student's cell," undisturbed by passions that have passed away, should not now have the slightest difficulty in perceiving that the revolt of those who refused to accept the judgment of the Supreme Court in the Dred Scott case was extra-constitutional, revolutionary; that the action of those who answered that revolt by an attempt to secede from the Union was extra-constitutional, revolutionary. The collision of those two irrepressible and unlawful forces precipitated the Civil War.

The conflict in the judicial arena.

Having now outlined the conflict that went on for sixty-one years in the political arena between the old provincial spirit strengthened by slavery and the new national spirit strengthened by intercommunication, a brief review must next be made of the same conflict as it appears in the judicial arena, with the courts as the arbitrating power. Just as Jefferson was the dominating mentality that directed the struggle carried on by the former in the political arena from 1798 down to the Civil War, so Marshall was the dominating mentality that directed the struggle carried on by the latter in the judicial arena, from 1801 down to the Civil War. Emphasis has been given already to the fact that a written constitution as a complete system of limitations upon the powers of a state to invade the "rights of man" is an invention that arose out of the politics of the French Revolution; that the right of a court to annul the act of a state, when in its judgment the limitations thus imposed have been exceeded, is purely an American invention, specially distinctive of our system of jurisprudence. That invention, originating in the state constitutions, was lifted into a higher sphere upon the creation of the Supreme Court of the United States, the first in history to claim or assert the right to pass upon the validity of a national law. The marvel is that neither in the state nor federal constitutions was this novel and far-reaching right bestowed by express constitutional grant; in both systems it emerged as a rule of judge-made law. Not until thirteen years after the organization of the Supreme Court was the first attempt made, in the case of Marbury *v.* Madison[1] (1803), to put the stamp of nullity upon a national law; and not until twenty years after its organization was the first attempt made, in the case of Fletcher *v.* Peck[2] (1810), to put the stamp of nullity upon a state law,

Marshall as a dominating force.

Right of a court to annul a law.

[1] 1 Cranch, 138.

[2] 6 Cranch, 87.

— in both instances by reason of repugnancy to the Federal Constitution. During the first eleven years of its existence the latent powers of the Supreme Court were in eclipse.[1] At the end of that time it was that Jay, on January 2, 1801, after his reappointment as Chief Justice, wrote to President Adams: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as a last resort of the justice of the nation, it should possess. Hence, I am induced to doubt both the propriety and expediency of my returning to the bench under the present system." [2]

Jay's despairing cry.

That despairing cry with which Jay abandoned our federal judicial system as impotent was a bugle-call to John Marshall, who, on February 4, 1801, the day of the first meeting of the Court in the permanent capital of the nation, took his place for the first time as Chief Justice, and as such sat in the midst of six associates for thirty-four years. From a careful estimate of the amount of work done by the Court during that period, it appears that of eleven hundred and six opinions filed, five hundred and nineteen were delivered by Marshall, the remainder being equally divided among the fifteen who were from time to time his associates. Of the sixty-two decisions delivered upon constitutional questions from 1801 to 1835, thirty-six were by Marshall, who filed but eight dissenting opinions, only one of which involved a question of constitutional law. He thus became not only the dominating mind of the Court, but its mouth-piece in a sense in which no Chief Justice has ever been, before or since. At the moment of his accession the time was ripe for the advent of a jurist and statesman clear-visioned enough to sweep the entire horizon of federal power, and bold enough to press each element of it to its logical conclusion. The ultimate success of his lifework was assured by the manner in which he solved the problem of problems that awaited him. In Marbury *v.* Madison (1803) the Supreme Court announced for the first time that it pos-

Scope of Marshall's work.

[1] For the history of that period, see Taylor, *Jur. and Pro. of the Supreme Court of the U. S.*, v–ix.

[2] Pellew's *Life of Jay*, 339.

sessed the right, as well as the power, to declare null and void an Act of Congress in violation of the Constitution. The invincible logic employed in the demonstration rested necessarily on the admission that the august right in question was a mere deduction from the general nature of a system of government whose constitution did not undertake to grant it in express terms.

Supremacy of federal law.

The prolonged duel at a later time between Webster and Calhoun was simply a continuation of the conflict that began when on February 4, 1801, Marshall took his place as Chief Justice, and Jefferson, on March 4, took his place as President of the United States. In their first encounter, which occurred in Marbury *v.* Madison, Jefferson was discomfited, because the Chief Justice, after holding that the proceeding against the Secretary of State must be dismissed for want of jurisdiction, coerced the President into delivering the commissions to the justices of the peace, whose issue he had countermanded, by a dictum in which the Court really had no right to indulge at all. In the next year the Court found occasion to remind the executive power that certain of its acts were liable to be annulled by the judicial, when in Little *v.* Barreme[1] (1804), a commander of a ship-of-war was held answerable to an injured person, even though he had acted under the instruction of the President, as "instructions not warranted by law cannot legalize a trespass." In 1805, in the case of the United States *v.* Fisher,[2] we find the Court, speaking through the Chief Justice, sustaining federal supremacy in cases of insolvency or bankruptcy. When the objection was made that such priority would "interfere with the right of the state sovereignties respecting the dignity of debts," the answer was that "the mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends." When in 1809 the state government of Pennsylvania went so far as to order out the state militia to oppose the mandate of a federal court, Marshall was equal to the occasion. Olmstead, one of the captors of the sloop Active, whose rights under a decree entered by the Standing Committee of Appeals in cases of capture had been for a long time set at naught by the State of

Pennsylvania coerced.

[1] 2 Cranch, 770.

[2] 2 Cranch, 358.

Pennsylvania, now filed his libel in the District Court for that state. When Judge Peters refused to grant an attachment, after a decree in his favor, an application for a mandamus to be directed to the judge was made to the Supreme Court; and in granting it the Chief Justice said: "The State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this case. It will be readily conceived that the order which this Court is enjoined to make by the high obligations of duty and of law is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed."[1] More than this, the general of the state militia and some of his men, who were called out by the governor to resist the service of the attachment, were convicted for forcibly obstructing federal process.

Cohens *v.* Virginia.

The supremacy of federal law was not, however, finally established until the more decisive judgment rendered in Cohens *v.* Virginia[2] (1821), in which the Chief Justice said: "They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state in the Union. That the Constitution, laws, and treaties may receive as many constructions as there are states, and that this is not a mischief, or if a mischief, is irremediable." After putting to flight such chimerical contentions, the Court at a little later day asserted with equal force that within the circle of their exclusive jurisdictions the state courts, when construing the constitutions and legislative acts of their respective states, are equally supreme.[3] When the original jurisdiction was invoked in the case of the Cherokee Nation *v.* Georgia[4] (1831), an injunction was asked to restrain the execution, in the territory of the Cherokee Nation, of certain laws of that state, the tribe claiming that, under the Constitution, they had the right to proceed as a foreign state. In denying that contention it was said that the Indian tribes residing within the acknowledged boundaries of the United States "may more correctly, perhaps,

Cherokee Nation *v.* Georgia.

[1] United States *v.* Peters, 5 Cranch, 115.

[2] 6 Wheat. 265.

[3] Bank of Hamilton *v.* Dudley, 2 Pet. 492.

[4] 5 Peters, 1.

be denominated domestic dependent nations." In Worcester *v.* Georgia[1] (1832), a law of that state was held to be unconstitutional and void, under which a missionary had been convicted of the crime of preaching to the Indians and residing among them without license from the governor. The State of Georgia met that decision with defiance, the governor declaring that he would rather hang than liberate the missionary under the mandate of the Supreme Court. To complicate the situation, President Jackson was not faithful to his duty. He is reported to have said: "John Marshall has made the decision, now let him execute it." It executed itself. At the end of eighteen months the contest of the weaker power against the national power had grown hopeless, and the prisoner was discharged.

Worcester *v.* Georgia.

The most notable products of Marshall's unprecedented judicial career may be summed up under two heads. In the first place, he established the supremacy of federal law within the entire circle of its jurisdiction, no matter whether it was opposed by the Congress or by a state legislature in the form of unconstitutional enactments, or by the President giving "instructions not warranted by law"; or by state supreme courts attempting to resist the mandates of the Supreme Court; or by the governors of states attempting to resist such mandates. And here it is hard not to note the marvel that in the first draft of the Constitution made by the great architect, February 16, 1783, he anticipated and defined the entire work of Marshall in this regard in four propositions, the first of which is that "no laws of any state whatever, which do not carry in them a force which extends to their effectual and final execution, can afford a certain or efficient security to the subject: this is too plain to need any proof."[2] To that he added: "Further, I propose, that if the execution of any act or order of the supreme authority shall be opposed by force in any of the states (which God forbid), it shall be lawful for Congress to send into such state a sufficient force to suppress it."

Pelatiah Webster blazed the way for Marshall.

While establishing the supremacy of federal law, Marshall familiarized the people of this country with the fact that there is "the nation," and "the American Constitution." In the

"The nation" and "the American Constitution."

[1] 6 Peters, 515.
[2] McCulloch *v.* Maryland, 4 Wheat. 316.

second place, in defining the character of "the American Constitution," a favorite phrase, he was careful to explain that it was something entirely different from the loose league embodied in the Articles of Confederation. In a great case he said: "To the formation of a league, such as was the Confederation, the state sovereignties were certainly competent. But when 'in order to form a more perfect Union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them." [1] Here we have a solemn declaration that the American Constitution is not a mere compact between states, dissoluble at pleasure, but an instrument of perpetual efficacy, emanating from the whole people, and construable by the judicial power, capable of enforcing its mandates, within the limits of its jurisdictions, against all opposing forces, legislative or executive. That conception of a constitution is purely an American creation; it has no prototype in history. It was that conception which, in the complete and scientific form given it by Marshall, crushed and drove out the French conception of a constitution as "a compact," without the judicial power as a factor in its construction, embodied by Jefferson in the Kentucky and Virginia Resolutions of 1798. The conception of a constitution as defined by Marshall and elaborated by his disciple, Daniel Webster, abides; the conception of a constitution as defined by Jefferson and elaborated by his disciple, Calhoun, has passed away.

Marshall's definition abides.

Roger B. Taney, who succeeded Marshall, served as Chief Justice from March 15, 1836, to October 12, 1864. The first opinion delivered by him on a constitutional question (Charles River Bridge *v.* Warren Bridge [2]) limited the far-reaching principle announced in the Dartmouth College case, by asserting the broad and wholesome doctrine that public grants are to

Dartmouth College case limited by Taney.

[1] McCulloch *v.* Maryland, 4 Wheat. 316.
[2] 11 Peters, 420.

be construed strictly; unless there is an express grant of an exclusive privilege, an implied contract to that effect is not to be inferred. With the prescience of a statesman he said: "Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travel, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place." During this epoch it was that a revolution was wrought in the commerce of the country through a transition from the primitive and ineffectual means of transportation by pack-horse and wagon to the new methods, resulting from the application of steam to locomotive on land as well as on water. One of the earliest results of the change was a substitution for the ancient English rule of admiralty and maritime jurisdiction, resting on the ebb and flow of the tide, of a new one better adapted to totally different physical conditions. In the case of the Genesee Chief *v.* Fitzhugh [1] (1851), the Court declared in no uncertain terms that the admiralty jurisdiction of the District Court extends not only beyond the flow of the tide in all navigable waters, but even over the great fresh-water lakes. The Chief Justice said: "These lakes are, in truth, inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the accidents and hazards that attend commerce on the ocean." Thus by a stroke of the judicial pen the admiralty jurisdiction of the federal courts was extended over vast areas of navigable water from which it had been excluded for sixty years by the ancient English rule fixing the ebb and flow of the tide instead of the navigable character of the water as the test of jurisdiction.

Admiralty jurisdiction re-defined.

Six years later, Taney reached the crisis of his career when he was called upon to preside in the famous Dred Scott case, in which was witnessed the failure of the attempt to settle by the judgment of a court of the highest dignity a question, in one aspect purely judicial, in another intensely political. The civilized world is now striving to establish some kind of an international tribunal which will be able to diminish if not

Certain questions not yet justiciable.

[1] 12 Howard, 443.

prevent wars by being armed through treaties with a jurisdiction over a certain class of delicate political questions heretofore regarded as not justiciable. The result in the Dred Scott case does not stimulate hope as to such experiments. The world has yet to be educated up to the idea that a certain class of supreme questions, whether national or international, are justiciable.

Attempted secession of the Southern States.

The states that attempted to secede proceeded with all the technical exactness the theories of Calhoun prescribed. The ordinance adopted by the Convention of South Carolina, December 20, 1860, declared: "We, the people of the State of South Carolina, in convention assembled, do declare and ordain, and it is hereby declared and ordained, that the ordinance adopted by us in convention on the 23d day of May, in the year of our Lord 1788, whereby the Constitution of the United States was ratified, and also all acts and parts of acts of the General Assembly of this state ratifying amendments of the said Constitution, are hereby repealed; and that the Union now subsisting between South Carolina and other states, under the name of the United States, is hereby dissolved." Similar ordinances were passed by conventions in Mississippi, January 9, 1861; Florida, January 10; Alabama, January 11; Georgia, January 19; Louisiana, January 26; and Texas, February 1. These seven were the original seceding states; afterward joined by Arkansas, May 6; North Carolina, May 20; Virginia, May 23; and Tennessee, June 18. No more perfect *de facto* government was ever formed than that known as the "Confederate States of America," whose constitution was a reproduction, with minor variations, of that of the United States. The new confederacy occupied a large area of territory; it maintained great armies in the field; and a small but terribly efficient navy. The Alabama, which wrought such destruction, was a ship-of-war commanded by a duly commissioned admiral, and not a privateer. It was therefore inevitable that the Supreme Court of the United States should hold that such a gigantic and prolonged contest carried on between two perfectly organized governments was not a rebellion, but a civil war in the highest sense of that term. It was so held in the Prize Cases[1] (1862), in which Mr. Justice Grier, speaking for the Court, said: "The greatest of civil wars

A perfect *de facto* government.

Character of contest defined by Supreme Court.

[1] 2 Black, 635.

was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war." Was there a war? Could there be a prize? — were questions which necessarily arose out of President Lincoln's proclamations of April 19 and 27, 1861, the blockade of the Southern ports, and the capture on the high seas of ships carrying contraband goods, or of ships owned by citizens of the states in revolt. It was directly adjudicated that the President possessed the right, *jure belli*, to institute a blockade of the ports in possession of the states in revolt, which neutrals were bound to respect. Then, after referring to the neutrality proclamations issued by Great Britain and other powers, the Court further said: "After such an official recognition by the sovereign, a citizen of a foreign state is estopped to deny the existence of the war, with all its consequences as to neutrals." When Chief Justice Taney, who was so indisposed as to be unable to sit during 1863, died in October, 1864, he was succeeded by Salmon P. Chase, who was commissioned as his successor December 6 of that year, after an absence from the bar of fifteen years. He arrived in time to pass upon all of the questions of international law or of prize growing out of the Civil War. In the first opinion delivered by him (The Circassian[1]), the rule of international law was announced that a vessel sailing from a neutral port with intent to violate a blockade is prize from the time of sailing, liable to capture and condemnation, and that the evidence of intent may be gathered, not only from letters and papers, but from the words and acts of the owners or hirers of the vessel, the shippers of the cargo and their agent, and especially from spoliation of papers on the eve of capture.

Chase Chief Justice, December 6, 1864.

But all such performances sink into insignificance when we contemplate the famous judgment in which the character of the Constitution was authoritatively defined after its temper had been tested in the fierce crucible of Civil War. In Texas *v.* White[2] the vital question was this: By the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and the acts of its legislature intended

Texas *v.* White, 1869.

[1] 2 Wallace, 135. [2] 7 Wallace, 700.

to give effect to that ordinance, did that state cease to be a state in the Union? Did its citizens cease to be citizens of the Union? In other words, is the Federal Constitution such "an instrument of perpetual efficacy, emanating from the whole people," as to be indissoluble by any state even when it attempts to break the bond by the act of a constitutional convention, ratified by a majority of its citizens? The Court, speaking through the deathless words of the Chief Justice, thus answered: "The Union of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to be perpetual! and when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble union more clearly than by these words. What can be indissoluble if a perpetual union made more perfect is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the states. . . . The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible states." Thus after a struggle of seventy-one years was cast out once and forever from our constitutional system the dangerous and entirely illogical heresy embodied in the Virginia Resolutions of 1798, which declared "that in case of deliberate, palpable, and dangerous exercise of other powers, not granted by said compact, the states, which are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them." The true nature of "the American Constitution"—defined by Chief Justice Marshall to be "an effective government, possessing great and sovereign powers, and acting directly on the people, . . . and deriving its powers directly from them. . . . In form and in substance it emanates from them"—was frankly and fully recognized by Chief Justice

An indestructible union defined.

Chase, who, in the epoch-making judgment in question, restated Marshall's conception in such a way as to make it the irrevocable basis of our new national life. That basis has been accepted by the nation as a whole, regardless of section or party, — not because it is the *ipse dixit* of a court, but because it is inherently sound and just. And yet the fact remains that this dominating conception of the Constitution is the outcome of the process through which a straggling series of republics, fringing our Atlantic seaboard towards the close of the eighteenth century, with a dim sense of union, have been rapidly transformed, through intercommunication, into a nation. It did not exist at the outset. And so this long chapter must end as it began with Savigny's declaration that the law of each country, public and private, must be regarded "as a member of its body, not as a garment merely, which has been made to please the fancy, and can be taken off at pleasure and exchanged for another." Law is the natural outcome of the consciousness of the people, like their social habits or their language. "We find in language a constant formation and development, and in the same way in law." Or, in the words of Sir James Mackintosh, "constitutions are not made, they grow."

Basis of our new national life.

# CHAPTER XI

## THE CIVIL WAR AMENDMENTS

Civil war suddenly precipitated.

FROM what has now been said it clearly appears that the question of slavery — after profoundly agitating and dividing this country politically, socially, and religiously, for more than seventy years — suddenly precipitated civil war. In the graphic language of the Supreme Court of the United States, "This greatest of civil wars was not gradually developed. . . . However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war."[1] It is not therefore strange that a gigantic upheaval so suddenly precipitated should have found the North entirely unprepared with a programme, prearranging the manner in which its armies in the field should deal with slavery as the war advanced, the final disposition that should be made of the millions of freedmen suddenly transformed from chattels into persons, and the manner in which the seceding states should be restored to their normal status in the Union. Tentatively, and bit by bit, a policy was evolved and executed, embracing all of these subjects, that in a large measure followed events and the dominant currents of public opinion in the North born of those events. The entire movement which occupied many years is generally described by the term Reconstruction, which embraces, first, the process by which the slaves were emancipated and then elevated to the status of full citizens; second, the process by which the seceding states, with such citizens added to the corporate person of each, were restored to their normal places in the Union. With that large section of our political history labeled Reconstruction no attempt will be made to deal here.[2]

North without a programme.

Reconstruction defined.

[1] Mr. Justice Grier in The Prize Cases, 2 Black, 635 (1862).

[2] I refer with great pleasure to the authoritative work, *Reconstruction by Eye-Witnesses* (1890), the chief contributor to which is my distinguished friend, the Hon. Hilary A. Herbert, who as jurist, soldier, member of Congress, and Secretary of the Navy, has made a record that is an honor at once to the South and to the Nation. He was one of President Cleveland's most trusted counselors.

Only that part of it will be touched which falls strictly within the domain of constitutional history, embracing the organic changes wrought by the Thirteenth, Fourteenth, and Fifteenth Amendments. As these three amendments all relate to a single subject-matter, which they disposed of progressively, they should be regarded as a single event, — as a single amendment to the Constitution. If they may be thus viewed, then the Constitution has been amended, in the manner in which its terms prescribe, only once in one hundred and six years, and then as the result of civil war. As each of the three amendments in question disposed of a distinct phase of the subject, each will be considered separately in the order of its ratification.

Unity of the three amendments.

The history of the Thirteenth Amendment really begins with this declaration made by Congress in July, 1861: "That this war is not prosecuted on our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor for the purpose of overthrowing or interfering with the rights or established institutions of those states, but to defend and maintain the supremacy of the Constitution and all laws made in pursuance thereof, and to preserve the Union with all the dignity, equality, and rights of the several states unimpaired; that as soon as these subjects are accomplished, the war ought to cease." In harmony with that declaration the President promptly disavowed the act of General Frémont, in Missouri, August 30, 1861, and that of General Hunter, in South Carolina, May 9, 1862, when they issued proclamations attempting to abolish slavery. But a marked change of feeling and of policy was manifested when in June and July of that year slavery in the territories was abolished by acts that also freed the captured, deserted, or fugitive slaves of all owners engaged in the Civil War, and authorized the employment of negro soldiers. By an act passed August 6, 1861, all claim of the master to the services of slaves employed in arms or labor against the Government had been forfeited; and by an additional article of war of March 13, 1862, the army was prohibited from returning fugitive slaves. The fugitive slave laws were not finally abolished, however, until June 28, 1864. The President's policy of emancipation with compensation was clearly indicated in his special message of March 6, 1862, in accordance with which the joint resolution of April 10 was passed, declar-

Thirteenth Amendment.

Slavery in territories abolished, 1861.

ing that the United States ought to coöperate with any state willing to adopt gradual "abolishment," upon the basis of compensation. On that basis was passed the Act of April 16, 1862, abolishing slavery in the District of Columbia. Not until after the border states had closed their ears to President Lincoln's generous advances in that direction did he yield to the demand of the anti-slavery forces of the North and issue his preliminary proclamation of September 22, of the year last named, which was followed by the famous Emancipation Proclamation of January 1, 1863.

Slavery in District of Columbia, abolished, 1862.

Emancipation Proclamation, 1863; its legal effect;

It is really impossible to attribute any legal effect to that proclamation, even as an exercise of the despotic war power in conquered territory, by reason of the peculiar terms in which it was drawn. Strangely enough, instead of providing for conditions within the conquered areas wherein the war power was in actual force, it undertook to free slaves, not on the soil then under military occupation, but on that not then occupied, therefore beyond the jurisdiction of the President as "commander-in-chief." The portions of Louisiana and Virginia actually conquered by the armies of the United States, and subject to military occupation at the time, were expressly exempted from the operation of the proclamation. When Douglas was attempting at Freeport in August, 1858, the impossible task of reconciling his doctrine of popular sovereignty with loyal support of the judgment in the Dred Scott case, Lincoln asked him this question: "Can the people of a territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits prior to the formation of a state constitution?" Douglas developed a vitally important point when he answered: "The people have the lawful means to introduce it or exclude it as they please, for the reason that slavery cannot exist a day or an hour anywhere *unless it is supported by local police regulations*." Upon that ground Mansfield released Sommersett, — there were no "local police regulations" in England, or in other words no positive law by which the master's possession could be enforced. The Duke of Wellington, in defining the nature and extent of the authority of a military occupant and his duty to govern, said: "Martial law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all;

exemptions from its operation.

Slavery must be supported by local police;

therefore the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules and regulations and limits according to which his will is carried out. Now, I have in another country carried out martial law; that is to say, I have governed a large proportion of a country by my own will. But then, what did I do? I declared that the country should be governed according to its own national law; and I carried into execution that my so declared will."[1] Thus it is clear that a commander in military occupation can either continue the existence of slavery by upholding the local laws by which it is sanctioned; or he can abolish it, for the time being, by the suspension of those laws. In either event his power to deal with the subject-matter is necessarily limited to the district in which he has actual military authority, and to the time during which such authority continues. The moment the peculiar status established by the military occupation ends, all the incidents growing out of it end with it. Thus no instant operation can be attributed to the proclamation in question, even as a war measure, as to those portions of the Southern States not in the actual military occupation of the Union forces on January 1, 1863. As to the parts of Virginia and Louisiana actually conquered, it declared that they were, "for the present, left precisely as if this proclamation were not issued"; as to the parts unconquered it declared "that all persons held as slaves within the said states and parts of states are and henceforth shall be free; and that the Executive Government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons." It may be that that part of the proclamation went into effect, as a war measure, progressively as the designated parts were conquered, and thus subjected to actual military occupation. But even then it is impossible that slavery could have been thus abolished by the proclamation in any constitutional sense. Congress and the President were equally impotent to overturn the compromises of the Constitution upholding the institution of slavery as their effect had been defined by the Supreme Court in the Dred Scott case. Therefore it is certain that slavery was never abolished, in a constitutional sense, until the ratification on December 18, 1865, of the Thir-

Slavery may be upheld or abolished by military occupant;

never abolished until ratification of Thirteenth Amendment.

[1] Hansard, 3d series, cxv, 881; Taylor, *Int. Pub. Law*, 596 *sq.*

teenth Amendment declaring that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." That view is confirmed by the judgment of the Supreme Court in Osborn *v.* Nicholson,[1] in which it was held that the constitution of Arkansas of 1868, which annuls all contracts for the purchase or sale of slaves, and declares that no court of the state should take cognizance of any suit founded on such a contract, is invalid as to all prior transactions; that it is no defense to an action for the price of a slave, sold when slavery existed, that the seller warranted him to be a slave for life, and that such warranty was broken by the subsequent constitutional abolishment of slavery. And to the same effect is White *v.* Hart.[2] In the Civil Rights cases,[3] it was held that the Thirteenth Amendment relates only to slavery and involuntary servitude, which it abolishes; and in Plessy *v.* Ferguson,[4] it was held that the amendment in question, abolishing slavery and involuntary servitude, was not violated by a state statute requiring separate accommodations for white and colored persons on railroads.

Liberation of master and slave.

No act of legislation in the world's history has been accepted and approved with more unanimity by all classes and conditions of men affected by it than that by which slavery was abolished in the United States. The reason for that unanimity is to be found in the fact that the constitutional act of abolition liberated at the same moment the master and the slave. By the Thirteenth Amendment the white people of the South were emancipated from a deadly institution. In the light of subsequent events they now realize that, entirely apart from its other drawbacks, slavery was the greatest of all obstacles in the path of their economic development. With a territory teeming with mineral wealth, and with a climate peculiarly suited to manufactures, the South was for seventy years chained by the institution of slavery to agriculture alone. In the Federal Convention of 1787 George Mason of Virginia said: "Slavery discourages arts and manufactures. The poor despise labor when performed by slaves. They prevent the emigration of

Mason's declaration.

[1] 13 Wall. 654.
[2] 13 Wall. 646.
[3] 109 U. S. 3.
[4] 163 U. S. 537.

whites who really enrich and strengthen a country." [1] Slave labor in the South, absorbed as it was in the rude work required for the production of cotton, tobacco, and sugar, was incapable of advance or development, while its presence excluded the influx of laborers who were. The results of the economic revolution wrought in the South by the abolition of slavery may be very briefly and vividly summed up. When the entire output of the South's productions for 1860 are arranged in two columns, that embracing farm products, with cotton included, represents practically everything, while that embracing the products of manufactures and mining represents practically nothing. To-day the mining and manufacturing products of the South exceed her entire agricultural output, including cotton. Of that great staple she is producing vastly more than in 1860, with the aid of her negro population in which not one penny of capital is invested. In the days of slavery the South deluded herself with the fancy that she was rich because of the hundreds of millions invested in the flesh and blood of her peasantry. The fallacy of that economic illusion is now apparent when with her capital invested in other and normal directions her peasantry is more productive as free men.

South's advance in production.

The general abolition of slavery, universal in the ancient world, represented one of the occasional breaks in the continuity of the history of law, the effect of which has been to clear the conception of a legal person as opposed to a thing from all the ambiguities attaching to that conception so long as human beings were treated to a greater or less extent as if they were chattels. In early law the right of a master over his slaves was of precisely the same extent and character as that which he had over his cattle, except that the slave was capable of manumission.[2] In Roman law the manumitted were called freedmen, who were subject to political disabilities, and to some duties arising from the peculiar laws of patronage. In the history of that system a large chapter is occupied by the disabilities of "*libertini*" and their duty toward their "*patroni*." [3] By the

A legal person as opposed to a thing.

[1] Gouverneur Morris said: "It is the curse of Heaven on the States where it prevailed. Travel through the whole continent and you behold the prospect continually varying with the appearance and disappearance of slavery."

[2] Cf. Taylor, *The Science of Jurisprudence*, 559.

[3] The improved position in Justinian law is manifested by the declaration that "slavery is con-

Thirteenth Amendment slaves as chattels were converted into freedmen (*libertini*); and then, without any intermediate probation, they were lifted to the status of full citizens in the American sense of that term, which carries with it the enjoyment of political rights.

Fourteenth Amendment.

The Constitution of the United States never reached its logical completion until after the adoption of the Fourteenth Amendment. As heretofore pointed out, the essence of the invention of Pelatiah Webster, which became the cornerstone of the existing Constitution, and which imparted to it its distinctive character, was embodied in the fact that its powers operate not upon states in their corporate capacity but directly on individuals as such. If that basic principle had been from the outset carried to its logical conclusion, it would have been settled from the beginning that the individuals upon whom the new and unique federal system acts are primarily its own citizens. Even in such a federal system as the Achaian League, "every Achaian citizen stood in a direct relation to the federal authority, and was in full strictness a citizen of the league itself, and not merely of one of the cities which composed it." [1] And yet at the time of the adoption of the present Constitution the sense of nationality had not sufficiently developed to permit the statement of the ultimate and inevitable conclusion, that every citizen of the Union is primarily a citizen of the United States, and not merely of one of the states which compose them. The one particular in which our first Federal Constitution rose above the older Teutonic leagues, after which it was patterned, was embodied in the new principle of interstate citizenship it originated. That principle infused itself neither into the constitution of the old German Empire, nor of Switzerland, nor of Holland.[2] Section 1 of Article IV of the Articles of Confederation provided that "the better to secure and perpetuate mutual friendship and intercourse among the people of different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from

An Achaian citizen.

Articles of Confederation.

trary to the law of nature; as according to natural law, all men were from the first born free." *Just.* 1. 2. 2. The doctrine that slavery is against nature, was older than Aristotle, who does not accept it. See W. L. Newman's *Politics of Aristotle*, Introd., 141.

[1] Freeman, *Federal Government*, i, 259.

[2] Bancroft, *History of the Constitution*, i, 118.

justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states." The substance of that provision was reproduced in Section 2 of Article IV of the present Constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Beyond that point the framers of the more perfect union were not prepared to go. They did not attempt to do more than establish an interstate citizenship, to which they imparted the qualities of uniformity and equality by denying to every state the right to discriminate in favor of its own citizens as against those of any other state. In the absence of any positive assertion by federal authority of any such thing as a primary citizenship of the United States as such, there was really no substantial basis upon which to maintain its existence. The better view is that prior to the adoption of the Fourteenth Amendment a man was a citizen of the United States only by virtue of his citizenship in one of the states composing the Union. If any such thing as a federal or national citizenship then existed at all, it was nothing more than a secondary and dependent relation.

No primary citizenship prior to Fourteenth Amendment.

In the case of Dred Scott a grand inquest was held with all the machinery of learning, and with all the accessories of prolonged and exhaustive argument, in order to ascertain whether or no such a thing existed as citizenship of the United States, defined as such by its Constitution and laws, independent of state citizenship. The most earnest seeker for such a citizenship was Mr. Justice Curtis, who was in the highest degree qualified to ascertain it, if it existed at all. His return was *non est inventus*. He ascertained that there was no such thing, at that time, as a citizenship of the United States, as a substantive thing independent of state citizenship. He said: "I can find nothing in the Constitution, which, *proprio vigore*, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any state after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any state, and entitled to citizenship of such state by its constitution and laws. And my opinion is that, under the Constitution of the United States, every free person born on the soil of a state, who is a citizen of that state by force of its con-

Inquest in Dred Scott case.

Justice Curtis's view.

stitution or laws, is also a citizen of the United States. . . . That the Constitution itself has defined citizenship of the United States by declaring what persons, born within the several states, shall or shall not be citizens of the United States, will not be pretended. It contains no such declaration."[1] He persuaded himself that Sandford's plea to the jurisdiction was bad, and that Scott had the right to sue because "every such citizen, residing in any state, has the right to sue, and is liable to be sued in the federal courts, as a citizen of that state in which he resides." And so, after conceding all that Mr. Justice Curtis claimed, it appears that such citizenship of the United States as Scott was supposed to possess was nothing more than a secondary and dependent relation resulting from his state citizenship. Such was the solecism existing in the Constitution at the time of its adoption. While it created the first federal government that ever operated directly on citizens, the fact remained that it had no citizens in its own right. To fill that vacuum was adopted the first section of the Fourteenth Amendment, which, without making any direct reference to the question of race at all, contains the first positive definition ever given of citizenship of the United States as a primary and substantive thing, independent of state citizenship. It provides that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Solecism in original Constitution.

Section 1, Fourteenth Amendment.

Slaughter-House cases.

The sequel of the Dred Scott case is to be found in the Slaughter-House cases[2] (1872), in which another grand inquest was held in order to ascertain the nature of the new citizenship brought into existence by the section in question. The case for the plaintiffs in error was presented in a far-reaching argument by the Honorable John A. Campbell, who had sat as one of the Justices in the Dred Scott case. The Court, speaking through Mr. Justice Miller, declared: (1) "The first section of

[1] Dred Scott *v.* Sandford, 19 Howard, 575.
[2] 16 Wallace, 36.

the Fourteenth Article, to which our attention is more specially invited, opens with a definition of citizenship — not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the Constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the courts, by the executive departments and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens. Whether this proposition was sound or not, had never been judicially decided. But it had been held by this Court, in the celebrated Dred Scott case, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States. This decision, while it met with the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution"; (2) "it [Section 1 of Article XIV] declares that persons may be citizens of the United States without regard to their citizenship in a particular state, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt"; (3) "the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union"; (4) "there is a citizenship of the United States and a citizenship of a state, which are distinct from each other,

Citizenship not previously defined.

Dred Scott case overturned.

and which depend upon different characteristics or circumstances in the individual"; (5) "privileges and immunities of the citizens of the United States . . . are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment. If then there is a difference between the privileges and immunities belonging to a citizen of the United States as such, the latter must rest for their security and protection where they have heretofore rested, for they are not embraced in this paragraph of the Amendment"; (6) "having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving these privileges and immunities may make it necessary to do so. But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal Government, its national character, its Constitution, or its laws. One of these is well described in the case of Crandall *v.* Nevada, 6 Wall. 36. It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right to free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several states. . . . Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privileges

What privileges the nation must protect.

What privileges states must protect.

Certain rights of national citizenship.

of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, and all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of the state." In explaining the motives that prompted the conversion of the freedmen, made such by the Thirteenth Amendment, into freemen, made such by the Fourteenth, the Court said: "Notwithstanding the formal recognition by those states of the abolition of slavery, the condition of the slave race would, without further protection of the Federal Government, be almost as bad as it was before. Among the first acts of legislation, adopted by several of the states in the legislative bodies which claimed to be in their normal relations with the Federal Government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property, to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity." An able commentator on the Fourteenth Amendment has said that it "nationalized the whole sphere of civil liberty. . . . Some of its provisions were already embodied in most of the state constitutions and bills of rights; but the experience of the Civil War and of the period of reconstruction had convinced the people that fundamental rights could no longer coexist in safety with unrestrained power in the states to alter their constitutions and laws as local prejudice or interest might prompt or passion impel. The rights of the individual to life, liberty, and property had to be secured by the Federal Constitution itself, as, indeed, they should have been when it was originally framed. The Amendment, therefore, placed the essential rights of life, liberty, and property in the several states of the Union under the ultimate protection of the National Government." [1]

Motives prompting Fourteenth Amendment.

Guthrie's view.

The national citizenship thus created as a substantive and independent thing was placed by Section 1 under the protection of a new Magna Carta, enforceable by the federal courts, the first portion of which was manufactured out of ancient

A new Magna Carta.

[1] Guthrie, *The Fourteenth Amendment*, 2.

English material, while the second is purely an American invention. Every citizen of the United States is now protected against unlawful state interference by the provision that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor (1) shall any state deprive any person of life, liberty, or property without due process of law; nor (2) deny to any person within its jurisdiction the equal protection of the laws." The last clause, invented at the time the Amendment was drawn, has no connection with English constitutional history. Mr. Justice Miller took entirely too narrow a view of that clause in the Slaughter-House cases when he said: "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." The broader views expressed by Justices Bradley and Swayne, on behalf of themselves and Chief Justice Chase, and by Justice Field in his dissenting opinion have prevailed. The far-sighted jurists since called upon to construe Section 1 — perceiving that it had wrought a revolution, that it had shifted the centre of gravity of the Constitution — have not been slow to dissever it from the question of slavery altogether. As no such word is contained in it, and no particular class or condition of persons is referred to, it has been easy to extend it beyond the protection of the colored race by making it a general rule of conduct, civil and political, established as a fixed standard of principles governing individual rights and liberties applicable at all times and to all conditions, by invoking Chief Justice Marshall's rule of construction, which declares that "the case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception."[1] It has been expressly held that "doubtless the intention of the Congress which framed and of the states which adopted this Amendment of the Constitution must be sought in the words of the Amendment; and the debates in Congress are not admissible as evidence to control the meaning of those words." [2]

Justice Miller's too narrow view.

Marshall's rule.

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518, 644.

[2] United States *v.* Wong Kim Ark, 169 U. S. 649, 699.

The wise and legitimate effort thus made to widen the new citizenship beyond the circumstances out of which it grew was greatly advanced when on the argument of the San Mateo County case[1] in the Supreme Court, December 19, 1882, Mr. Roscoe Conkling, a leading member of the Reconstruction Committee that framed the Amendment, produced for the first time the unpublished journal of the committee, which showed, step by step, the evolution of its provisions. That it was the purpose of the Committee to give to such provisions the broadest scope and operation, and not in any way to confine their benefit and protection to the colored race, was made plain by Mr. Conkling, who, in the course of his argument, said: "At the time the Fourteenth Amendment was ratified, as the records of the two Houses will show, individuals and joint-stock companies were appealing for congressional and administrative protection against invidious and discriminating state and local taxes. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York, who came with petitions and bills seeking Acts of Congress to aid them in resisting what they deemed oppressive taxation in two states, and oppressive and ruinous rules of damages applied under state laws. That complaints of oppression in respect of property and other rights, made by citizens of Northern States who took up residence in the South, were rife, in and out of Congress, none of us can forget; that complaints of oppression in various forms, of white men in the South, — of 'Union men,' — were heard on every side, I need not remind the Court. The war and its results, the condition of the freedmen, and the manifest duty owed to them, no doubt brought on the occasion for constitutional amendment; but when the occasion came, and men set themselves to the task, the accumulated evils falling within the purview of the work were the surrounding circumstances, in the light of which they strove to increase and strengthen the safeguards of the Constitution and laws."

San Mateo County case.

Conkling's statement.

In 1883 Mr. Justice Field, in his decision in the Railroad Tax cases[2] in the United States Circuit Court of California, said: "Oppression of the person and spoliation of property by any state were thus forbidden, and equality before the law was

Justice Field in Railroad Tax cases.

[1] 116 U. S. 138.

[2] Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394.

secured to all. . . . With the adoption of the Amendment the power of the states to oppress any one under any pretense or in any form was forever ended; and thenceforth all persons within their jurisdiction could claim equal protection under the laws. . . . No state — such is the sovereign command of the whole people of the United States — no state shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no state, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws."

Justice Brown in Plessy *v.* Ferguson.

At a little later day the Supreme Court settled another aspect of the matter of vital importance to the harmony of the country. In Plessy *v.* Ferguson,[1] speaking through Mr. Justice Brown, it said: "A statute which implies a mere legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or reëstablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection. 2. By the Fourteenth Amendment all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the state wherein they reside. . . . The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states

Distinctions based on color.

[1] 163 U. S. 537.

where the political rights of the colored race have been longest and most earnestly enforced. . . . In United States *v.* Stanley (Civil Rights cases), 109 U. S. 3, it was held that an Act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres, and other places of amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the ground that the Fourteenth Amendment was prohibitory upon the states only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the states were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the Court, Mr. Justice Bradley observed that the Fourteenth Amendment 'does not invest Congress with power to legislate upon subjects that are within the domain of state legislation, but to provide modes of relief against state legislation or state action, of the kind referred to.'"

Civil Rights cases.

As the protection guaranteed by our new Magna Carta extends to all "persons born or naturalized in the United States, and subject to the jurisdiction thereof," it is not strange that persons of all races, as well as artificial persons, should have sought shelter under its paramount authority. Where the parents of a child born in the United States were citizens, there could be no difficulty as to its nationality; but the status of a child born in the United States of Indians, or of Chinese, or other alien parentage was quite another matter. In the case of Elk *v.* Wilkins[1] it was held that an Indian born a member of one of our Indian tribes still recognized as such — although he had voluntarily separated himself from his tribe and taken up his residence among the white people, but without being naturalized or taxed — was born "subject to the jurisdiction" of his tribe. Therefore he was not a citizen of the United States, because not born "subject to the jurisdiction" thereof. Such was the prelude to the great case in which was settled the legal

Persons born "subject to the jurisdiction."

[1] 112 U. S. 94, 98.

U. S. v. Wong Kim Ark.

status of all other persons born in the United States of alien parentage. In United States *v.* Wong Kim Ark [1] it was held that a child born in the United States of parents of Chinese descent — who at the time of his birth are subjects of the Emperor of China, but have a permanent domicile and residence in this country, and are carrying on business here, and are not employed in any diplomatic or official capacity under the Emperor of China — becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment. Here the rule of the civil law as to the allegiance of the parents was set aside in favor of the common law rule of locality of birth, under which it has been long held that every child born in England of alien parents is a natural born subject, unless the child of a diplomatic representative of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born. In tracing that principle with its qualifications back to the leading case, known as Calvin's case, or the case of the Postnati,[2] decided in 1608, the Court, speaking through Mr. Justice Gray, said that the Constitution of the United States must be interpreted in the light of the common law: "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. 124 U. S. 478. II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith,' or 'power' of the King. The principle embraced all persons born within the King's allegiance and subject to his protection." That conclusion as to the citizenship of a child born of alien parentage was not reached until thirty years after the adoption of the clause in question. Not until after the lapse of eighteen years was it definitely held for the first time, in the case of Santa Clara Co. *v.* Southern Pacific Railroad,[3] that a corporation is a person within the meaning of the first section. Then followed the cases of Minn. Ry. Co. *v.* Beckwith,[4] Covington & L. Turnp. Road Co. *v.* Sandford [5] and Smyth *v.* Ames,[6] in which "it is now

Rule in Calvin's case followed.

A corporation a person,

[1] 169 U. S. 649 (1898).

[2] See *The Origin and Growth of the Eng. Const.*, ii, 227 *sq.*

[3] 118 U. S. 394 (1886).

[4] 129 U. S. 268.

[5] 164 U. S. 578.

[6] 169 U. S. 466.

settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as the denial of the equal protection of the laws." Thus it was settled that corporations are "persons" but not "citizens" entitled to the "privileges or immunities of citizens of the United States." As the Santa Clara case involved a domestic corporation it was afterwards held in Philadelphia Fire Ass. *v.* New York,[1] that a state could prescribe whatever condition it saw fit for permitting a foreign insurance company to transact business within its limits even to the extent of total exclusion, although it could not exclude an individual. Such power of exclusion cannot be applied, however, to corporations engaged in interstate commerce, or to agencies of the General Government. "The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal Government, is not to be restricted by state authority." [2]

not a citizen.

Power of exclusion.

When the first section of the Fourteenth Amendment provided, "nor shall any state deprive any person of life, liberty, or property, without due process of law," it cast upon the Supreme Court the profoundly difficult task of defining and applying to a vast number of subject-matters an historic formula which has descended to us from the Great Charter of King John (1215), whose thirty-ninth chapter declares that "no freeman shall be arrested, or detained in prison, or disseized, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." In the reissues of the Great Charter this provision appears with the insertion in the second (2 Hen. III, 1217) and third (9 Hen. III, 1225) charters of Henry III, of the words "of his freehold or liberties, or free customs," so that the clause in its final form is: "No freeman shall be arrested, or detained in prison, or dis-

39th chapter of Magna Carta, 1215.

[1] 119 U. S. 110.

[2] Pembina Con. Silver Mining Co. *v.* Pa., 125 U. S. 181.

seized *of his freehold*, or *liberties*, or *free customs*, or outlawed, or banished,"[1] etc. By the Confirmatio Cartarum of 1297 the Great Charter, which came to be regarded with almost superstitious reverence, was taken out of the category of statutes and became "a sacred text, the nearest approach to a 'fundamental statute' that England has ever had."[2] As such a document was appealed to by each succeeding generation as a living guarantee of the rights to which it aspired, it came to be interpreted in each age according to its needs and aspirations. A famous commentator on Goethe's *Faust* has said: "Like all the really great productions of literature this world-poem possesses the magic power of appealing in a different way to every new generation; and like the fathomless crystal lake of the high Sierras it reflects only the picture of the beholder."[3] And so the English people have been looking from age to age into the Great Charter, which has mirrored for each succeeding generation its own peculiar conception of civil liberty. Out of the English Renaissance and Reformation grew the larger conception of that subject which expressed itself in the Puritan Revolution of 1640. In the first stage of the struggle with the Stuarts appeared upon the scene a dogmatic lawyer whose aspirations in favor of liberty were deeply colored by his associations with the past. Coke's First Institute, begun in 1621, was completed in 1628, while his Second Institute — a commentary on Magna Carta and other statutes, so frequently appealed to by our courts as the best exposition of them — was not published until 1632. In estimating the value of Coke as an expounder of the Great Charter, it is impossible to ignore the fact that, after having sat in the Star Chamber, he died September 3, 1634, while the entire code of Star Chamber law and High Commission law was in full force. As an illustration, down to his death the system of compulsory self-incrimination was a part of the Star Chamber code. During the one hundred and forty-two years that intervened between the death of Coke and the

Confirmatio Cartarum, 1297.

Coke's Second Institute, 1632.

[1] In the original text of 9 Henry III, chapter 29 reads: "Nullus liber homo capiatur vel imprisonetur aut disseisietur *de libero tenemento suo vel libertatibus, vel liberis consuetudinibus suis*, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae."

[2] Pollock & Maitland, *Hist.* (2d ed.) i, 173.

[3] Dr. Julius Goebel's *Faust*, p. vi.

severance of the English colonies in America from the mother country, what may be called the ancient Constitution of England, first clearly defined in the Great Charter, was transformed into the modern Constitution by the Revolutions of 1640 and 1688. The reformed and invigorated constitutional system that stands out after those revolutions was a vastly wider and more complete fabric of liberty under law than that existing in Coke's time. Those revolutions brought into being many new constitutional principles of which Coke never heard. The great English commentator, Blackstone, who looked into "the fathomless crystal lake," in 1758 had reflected for him a condition of things Coke could not possibly have seen in 1632. As the "Commentaries" of Blackstone flooded this country just before the Revolution, American statesmen and jurists of that day knew Coke through Blackstone, with his doctrines amended and expanded by the changes the Revolutions of 1640 and 1688 had wrought in the ancient Constitution as it stood in 1632. Thus trained and influenced, the founders of the Republic epitomized in our first state constitutions the modern English Constitution as Blackstone had defined it.

Blackstone, 1758.

If anything is certain in the history of any country it is that the essence of the English constitutional system as reformed by the Revolutions of 1640 and 1688, and as defined by Blackstone in 1758, passed into our first state constitutions, whose bills of rights set forth, for the first time, in a written and dogmatic form, the entire scheme of civil liberty as it existed in England in 1776. The draftsmen of those bills of rights would have recoiled with horror at the thought that they were founding American constitutional law upon the ancient English Constitution as it existed in 1632, before the meeting of the Long Parliament, with the Star Chamber and High Commission intact. And here the fact should be noted that in the bills of rights adopted in 1776, or shortly thereafter, certain new principles of constitutional law that had come into existence on the other side of the Atlantic were here cast for the first time in a dogmatic form. As an illustration, reference may be made to the Bill of Rights of Virginia of 1776, which declares "that the legislative and executive powers of the state, should be separate and distinct from the judiciary." Montesquieu [1]

Influence of reformed English Constitution.

Bill of Rights of Virginia, 1776.

[1] *Spirit of Laws*, bk. xi, ch. 6.

had some years before noted the existence of that division as peculiarly distinctive of the English Constitution, but it was first stated in a dogmatic form in the Virginia Bill of Rights drafted by George Mason. In the same instrument it is stated as a principle of constitutional law, in connection with trial by jury, that no man can "be compelled to give evidence against himself," — a formula repeated in almost the same words in most, if not all, of the contemporary documents. Not until after the Revolution of 1688, and as a consequence of it, was the principle of compulsory self-incrimination abolished. As Stephen has expressed it: "Soon after the Revolution of 1688, the practice of questioning the prisoner died out";[1] it was not abolished by statute or ordinance. And so it came to pass that the exemption from that cruel provision of the Star Chamber code was first defined as a principle of constitutional law in the American bills of rights of 1776. In the same way passed into those documents the various restatements of chapter 39 of the Great Charter in which were first reflected the American conception of due process of law.

Compulsory self-incrimination abolished.

Restatements of chapter 39.

It appears in the following forms in the state constitutions of 1776. In the act of that year, continuing the charter of Connecticut of 1662 as the organic law of the state, it is provided "that no man's life shall be taken away: no man's honor or good name shall be stained: no man's person shall be arrested, restrained, banished, dismembered, nor any ways punished: no man shall be deprived of his wife or children: no man's goods or estate shall be taken away from him, nor any ways indamaged under the color of law, or countenance of authority; unless clearly warranted by the laws of this state." In Maryland's constitution of the same year it is provided "that every freeman, for any injury done him in his person or his property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, freely without any denial, and speedily without delay, according to the law of the land." In North Carolina's constitution of the same year it is provided "that no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." In Pennsyl-

[1] *History of the Criminal Law of England*, i, 440.

vania's constitution of the same year it is provided, "nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers." In Virginia's constitution of the same year it is provided "that no man be deprived of his liberty, except by the law of the land or by the judgment of his peers." In Vermont's constitution, drafted in 1777 and affirmed in 1779, it is provided, "nor can any man be justly deprived of his liberty, except by the laws of the land or the judgment of his peers." In South Carolina's constitution of 1778 it is provided "that no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled, or in any manner disseized or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land." In Massachusetts' constitution of 1780 it is provided that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." In the New Hampshire constitution of 1784 the same provision is repeated, word for word.

Genesis of English conception of due process of law.

An attempt has now been made to state within a narrow compass the history of the famous formula that underlies the English conception of due process of law, from its advent in the Great Charter of 1215 down to its embodiment in the American state constitutions adopted in 1776 or shortly thereafter. Emphasis has been given, first, to the fact that during the five hundred and sixty-one years intervening between those dates the meaning of the formula varied from age to age, each generation perceiving in it its own peculiar conception of civil liberty; second, to the fact that our American states adopted it with the meaning attached to it in 1776. If Bishop Stubbs may say that "the whole of the constitutional history of England is little more than a commentary on Magna Carta,"[1] we may say that the very heart, the very essence of that history is embodied in the 39th chapter, whose outcome has transformed the government of England into a government of law as distinguished from a government of functionaries. In the weighty words of Lieber, "The guarantee of the supremacy of law leads

[1] *Constitutional History*, i, 572.

to a principle which, so far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which, nevertheless, has been, in our system of liberty, the natural production of a thorough government of law as contradistinguished to a government of functionaries."[1] This purely Anglican "guarantee of the supremacy of law" first passed into the Constitution of the United States as a part of the Fifth Amendment, which provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or in public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

A government of law as distinguished from one of functionaries.

Strangely enough, not until the judgment in Murray *v.* Hoboken Land Co.,[2] rendered in 1856, was the clause providing that "no person shall be . . . deprived of life, liberty, or property, without due process of law" submitted to the Supreme Court of the United States, where it was expounded in the light of its history. In that case the Court, speaking through Mr. Justice Curtis, said: "The effect of the proceedings authorized by the Act in question is to deprive the party, against whom the warrant issues, of his life and property, without due process of law; and therefore is in conflict with the fifth article of the Amendments of the Constitution. . . . The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in Magna Carta. Lord Coke in his commentary on those words (2 Inst. 50), says, they mean due process of law. The constitutions which had been adopted by the several states before the formation of the Federal Constitution, following the language of the Great Charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.' . . . To have taken the clause 'law of the land,' without its immediate context, might possibly have given rise to doubts, which would be

Murray *v.* Hoboken Land Co., 1856

[1] *Civil Liberty and Self-Government*, 91.

[2] 18 Howard, 272.

effectually dispelled by using those words which the great commentator on Magna Carta had declared to be the true meaning of the phrase 'law of the land' in that instrument, and which were undoubtedly then received as their true meaning." Here began the manifest historical error of appealing to Coke's commentary on Magna Carta, published in 1632, as the true key to its meaning, instead of to the "Commentaries" of Blackstone, put in their present form in 1758, after the meaning of due process of law had been vastly widened by the results of the Revolutions of 1640 and 1688. The historical error thus inaugurated was repeated when in 1878 the Supreme Court was called upon for the first time to construe, in Davidson *v.* New Orleans,[1] that clause of the Fourteenth Amendment which declares, "nor shall any state deprive any person of life, liberty, or property, without due process of law." In that case the Court, speaking through Mr. Justice Miller, said: "The prohibition against depriving the citizen or subject of his life, liberty, or property, without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866. The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guaranties of the rights of the subject against the oppression of the Crown."

A manifest historical error.

Davidson *v.* New Orleans.

As early as 1883, Mr. Justice Matthews, when confronted, in Hurtado *v.* California,[2] with Mr. Justice Curtis's misleading historical statement, rejected it, saying: "This, it is argued, furnishes an indispensable test of what constitutes 'due process of law': that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law. . . . But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. This

Hurtado *v.* California.

[1] 96 U. S. 97. [2] 110 U. S. 528.

would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, *the words of Magna Carta stood for very different things*, AT THE TIME OF THE SEPARATION OF THE AMERICAN COLONIES, *from what they represented originally*. . . . In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, *and the provisions of Magna Carta were incorporated into Bills of Rights*"; that is, into bills of rights of the first state constitutions, because there were no other bills of rights. In these golden sentences Mr. Justice Matthews solved the problem by announcing that the Supreme Court, when construing the due process of law clause as it appears in the Fifth and Fourteenth Amendments, should take that formula with the meaning annexed to it in English constitutional law, "*at the time of the separation of the American Colonies*," as contradistinguished from the meaning annexed to it in 1632, when Coke's Second Institute was published. That conclusion he greatly strengthened by the statement that "the provisions of Magna Carta were incorporated into Bills of Rights," that is, into the bills of rights of our first state constitutions. Thus a new and unassailable historical test was laid down as a guide whenever a particular law or procedure is drawn in question on the ground that it is wanting in due process of law, and that new test received emphatic confirmation when the Supreme Court, speaking through Mr. Justice Gray in Lowe *v.* Kansas,[1] said: "Whether the mode of proceeding prescribed by this statute, and followed in this case, was due process of law depends upon the question *whether it was in substantial accord with the law and usage of England* BEFORE THE DECLARATION OF INDEPENDENCE, and in this country since it became a nation, in similar cases." That emphatic refusal to recognize as a correct historical test the condition of English constitutional law as it existed in 1632 was repeated in no uncertain terms in Twining *v.* New Jersey,[2] when the Supreme Court, speaking through Mr. Justice Moody, said: "It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and prac-

Lowe v. Kansas.

Twining v. New Jersey.

[1] 163 U. S. 81. [2] 211 U. S. 101.

ticed by our ancestors, is an essential element of due process of law. *If that were so the procedure of the first half of the seventeenth century would be fastened upon American jurisprudence like a strait-jacket, only to be loosed by constitutional amendment.*" Let us hope that it has thus been irrevocably settled that when the new Magna Carta, by which the national citizenship created by the first section of the Fourteenth Amendment is guarded, is to be construed, it will not be held to be the "strait-jacket" defined in Coke's Second Institute published in 1632, before the meeting of the Long Parliament, but that wider and more enlightened system of civil liberty as understood in England after the results of the glorious Revolutions of 1640 and 1688 had been fully worked out.

Rule of inclusion and exclusion.

After all that has been said is admitted, the fact remains that it is gravely difficult in a particular case to determine when the act of a state, executive, legislative, or judicial, takes away from a citizen of the United States, as such, a right so fundamental that its loss may be said to "deprive any person of life, liberty, or property, without due process of law." Conceding that that formula is to be taken here with the broad and liberal meaning attached to it at the time of the severance from the mother country, the task of defining its precise scope and meaning is so difficult that the Supreme Court has persistently declined to undertake it. In the place of a definition the Court has discreetly substituted a working rule best described in its own language: "But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."[1] In a word, the rule is that when a citizen of the United States, as such, complains that a fundamental right guaranteed by the clause in question has been taken away, the Court will say in that particular case whether the right is an incident of national citizenship, and as such within its protection, or an incident of state citizenship, whose protection belongs to the state alone.

[1] Davidson *v.* New Orleans, 96 U. S. 97.

The effort to narrow federal jurisdiction.

That there is a strong practical motive always impelling the Court to narrow its jurisdiction by taking the latter view, has been admitted by the Court itself. After stating that so long as the due process of law clause was only a part of the Fifth Amendment it "has rarely been invoked in the judicial forum, or the more enlarged theatre of public discussion," attention was called to the fact, as early as 1878, that "while it has been a part of the Constitution, *as a restraint upon the power of the states*, only a few years, the docket of this Court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their citizens of life, liberty, or property, without due process of law."[1] Since that statement was made, the swelling tide of litigation of that character has increased the necessity that compels the Court to decline jurisdiction in every case not manifestly within the terms of the clause in question. In the famous Slaughter-House cases the Court justly declined jurisdiction upon the ground "that the privileges and immunities relied on in argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection." In Davidson *v.* New Orleans the Court declined jurisdiction on the same ground, saying, "It [the act of the state] may violate some provision of the state constitution against unequal taxation, but the Federal Constitution imposes no restraints on the states in that regard." In Hurtado *v.* California the Court held that a citizen of the United States cannot complain of a conviction in a state court upon an information for murder in the first degree and a sentence of death thereon, because the due process of law clause in question does not necessarily require an indictment by a grand jury in a prosecution by a state for murder. The states are thus enabled to abolish, whenever they see fit, the grand jury system, as a part of the machinery of criminal justice. In Maxwell *v.* Dow, the Court, after affirming the case just cited, went a step further by declaring that "if the state has the power to abolish the grand jury and the consequent proceeding by indictment, the same course of reasoning which established that right will and does establish the right to alter the number of the petit jury from that provided by the common law." In that case the Court emphasized the

A state may abolish grand jury system.

May alter number of petit jury.

[1] The Slaughter-House cases, 16 Wall. 36.

doctrine that the adoption of the Fourteenth Amendment has not had the effect of making all the provisions contained in the first eight amendments operative in state courts, on the ground that the fundamental rights protected by those amendments are, by virtue of the Fourteenth Amendment, to be regarded as privileges or immunities of citizens of the United States.

An unsound conclusion.

While the tendency of the foregoing decisions is clearly in the right direction, it is difficult for a student of English constitutional law to assent to the conclusion reached in Twining *v.* New Jersey, in which it was held that exemption from self-incrimination — so firmly settled in the mother country before the separation that all or nearly all of the original state constitutions bristle with a solemn restatement of it — is not one of the fundamental rights of national citizenship guaranteed by the clause in question. Mr. Justice Harlan was right when he said: "I cannot support any judgment declaring that immunity from self-incrimination is not one of the privileges or immunities of national citizenship, nor a part of the liberty guaranteed by the Fourteenth Amendment against hostile state action." His dissenting opinion should have been the judgment of the Court. While Mr. Justice Moody's statement, that "none of the great instruments in which we are accustomed to look for the declaration of fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Carta (1215), and could not have been implied in the 'law of the land' there secured," is true, — it is unimportant. All of the fundamental rights that emerged from the Revolutions of 1640 and 1688 were not formulated in documents prior to the separation. A conspicuous example is to be found in the freedom of speech and the press of which no trace can be found either in Magna Carta or in any English document prior to 1776. The student of American constitutional law should never for a moment forget that the best epitomes of the reformed English Constitution ever written are to be found in the bills of rights of our first state constitutions drafted by men who knew perfectly what rights were fundamental at that time. The fact that they recognized, with wonderful unanimity, that the exemption from self-incrimination had become fundamental, and that as such they made it one

Importance of our first bills of rights.

of the foundation-stones of our American system, should be conclusive on every American court.

Prohibition extends to all state acts.

From the outset it has been settled "that it is no matter by what proceeding, or in what manner, the state deprives the person of life, liberty, or property, or denies him the equal protection of the law, without due process of law, whether by legislation or *judicial decision*, or by what officer or agent, or agency, so it be by state authority."[1] In Scott *v.* McNeal,[2] it is said: "These prohibitions [of the Fourteenth Amendment] extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. . . . Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by *that court's construction of a statute of the territory or of the state*, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law." In Twining *v.* New Jersey,[3] the Court said: "The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state."

After the Parliament of Great Britain, once a local legislature, had widened the circle of its jurisdiction, Burke said: "I think her nobler capacity is what I call her imperial character; in which, as from the throne of heaven, she superintends all the several inferior legislatures, and guides and controls them all without annihilating any."[4] In the high place to which the Supreme Court has been lifted as the ultimate guardian of the new national citizenship, it has been given, as never before, the power to superintend all the agencies of the states; and it may be truly said that it is faithfully striving to guide and control them all without annihilating any. No trust so vast or so delicate was ever before committed to any court in the world's history, — upon its wise and serene execution must mainly depend the future harmony between the state and federal systems.

Supreme Court guardian of new citizenship.

[1] Brannon, *Fourteenth Amendment*, 97, citing *Ex parte* Virginia, 313; Chicago, B. & Q. Co. *v.* Chicago, 166 U. S. 685.

[2] 154 U. S. 34.

[3] 211 U. S. 90.

[4] Speech on American Taxation, April 19, 1774, *Works* (4th ed.), ii, 75.

It has opened up a fresh fountain of judge-made law from which a copious stream has been flowing for more than forty years. Whenever a new problem arises, it is solved by a new judge-made rule, expounded in a treatise corresponding very closely to the responses made by the jurisconsults in the creative epoch of Roman jurisprudence. Such treatises, still in a plastic form, will sooner or later be systematized and reduced to compendia as the responses were in Roman law.[1]

Old three-fifths rule abolished.

In conclusion, the fact should be noted that the old three-fifths rule as to Representatives and direct taxes (Article 1, Section 2, Clause 3) has been amended by Section 2 of the Fourteenth Amendment, which provides that "Representatives shall be apportioned among the states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

Fifteenth Amendment.

"A few years' experience satisfied the thoughtful men who had been the authors of the other two Amendments that, notwithstanding the restraints of those two articles on the states, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by white men alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully

[1] An inspection of the annotated Constitution in Appendix XX will disclose the fact that the cases so far decided, involving the construction of the Fourteenth Amendment, constitute of themselves a distinct literature to which several text-books have already been devoted.

secured in their persons and their property without the right of suffrage. Hence the Fifteenth Amendment, which declares that 'the right of a citizen of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude.' The negro having, by the Fourteenth Amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union."[1]

Right to vote drawn from state.

Our political system as a whole rests upon the fundamental principle that the right to vote in a state comes from the state, which alone possesses the power to confer the franchise. Only from the fountain of state power can the right to vote for officials, state or federal, be drawn. The electors of President and Vice-President are state officers, the method of whose appointment the Federal Constitution has no power to direct or control. In McPherson *v.* Blacker,[2] it was held that the Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to determine the method of effecting the object. The appointment and mode of appointment of electors belong exclusively to the states under the Constitution. The qualifications of the electors of the House of Representatives are prescribed by the states. Such "electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures." As explained heretofore, when our state system was founded the right to vote was in the mother country the privilege of the few, not of the many. At the time of the separation the entire electorate of the British Isles (which included, in 1909, 7,615,438 electors) did not exceed 400,000.[3] Every American state was founded on the principle that it alone could confer the right to vote upon the few or the many as its sovereign will deemed best. To-day any American state can so amend its constitution as to provide that no man can vote until he attains his ninetieth year, or that no man can vote unless he is

Electors of House of Representatives.

[1] Mr. Justice Miller in the Slaughter-Houses cases, 16 Wall. 36.

[2] 146 U. S. 1.

[3] See the estimate of Dr. Gneist, *History of the English Constitution*, p. 722.

possessed of real property to the value of a million of dollars, or it might provide that the right to vote shall be vested in women only. Such a state constitution would not conflict with the national Constitution in any particular whatsoever. The only limitation imposed by that Constitution upon the sovereign power of the states to regulate the franchise is that contained in the Fifteenth Amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state *on account of race, color, or previous condition of servitude.*" Unless the right to vote, which is derived from the state, is "denied or abridged" upon that ground, the Amendment has no application. It was therefore held, in United States *v.* Cruikshank,[1] that the right of suffrage is not a necessary attribute of national citizenship, but exemption from discrimination in the exercise of that right "on account of race, color, or previous condition of servitude" is. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States; the former has not been granted or secured by the Federal Constitution, but the latter has been. That conclusion was first announced in United States *v.* Reese,[2] in which it was said that the Amendment in question does not confer the right of suffrage upon any one. It prevents the states or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. The whole matter was ably summed up in Pope *v.* Williams,[3] in which the Court, speaking through Mr. Justice Peckham, said: "The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Minor *v.* Happersett, 21 Wall. 162. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as the state may deem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution. The state might

Only one limitation on state power.

Pope *v.* Williams.

[1] 92 U. S. 542. [2] 92 U. S. 214. [3] 193 U. S. 621.

provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in Minor *v.* Happersett, 21 Wall. 162, such persons were allowed to vote in several of the states upon having declared their intention to become citizens of the United States. Some states permit women to vote; others refuse them that privilege."

Recent Southern constitutions.

Such were the powers and such the disabilities under which the Southern States acted in so remodeling their constitutions in recent years as to meet the aabormal conditions arising out of the enfranchisement of the freedmen, who were suddenly lifted, without training or probation, from a state of servitude to full citizenship. No patriotic mind can ignore the gravity or the peril of a situation that has no precedent in political history. Among the Southern statesmen who grappled with that mighty problem stands preëminent Senator George of Mississippi, a profound jurist who, as chief justice of his state, had been trained for the task. When the fruit of his labors came before the Supreme Court in Williams *v.* Mississippi,[1] it appeared that he had drafted a constitution in which "every elector shall, in addition to the foregoing qualifications, be able to read any section of the constitution of this state, or he shall be able to understand the same when read to him, or to give a reasonable interpretation thereof. . . . No person shall be a grand or petit juror unless a qualified elector and able to read and write." The complaint was that such a constitution — which it was admitted did not "discriminate in terms against the negro race, either as to the elective franchise or the privilege or duty of sitting on juries" — did vest the power in "the administrative officer to determine whether the applicant reads, understands, or interprets the section of the constitution designated. The officer is the sole judge of the examination of the applicant, and even though the applicant be qualified, it is left with the officer to so determine; and the said officer can refuse him registration." Under such conditions the Court held that the equal protection of the laws is not denied to colored persons by a state constitution and laws which make no discrimination against the colored race in terms, but which grant a discretion to certain officers, which can be used to the abridgment of the right of the colored persons to vote and serve on

Williams *v.* Mississippi.

[1] 170 U. S. 213 (1898).

juries, — when it is not shown that their actual administration is evil, but only that evil is possible under them.

A few years later the right of a state to regulate the franchise under a similar constitution came before the Supreme Court in Giles *v.* Harris,[1] in which a bill was filed praying that certain sections of the existing constitution of Alabama "may be declared contrary to the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and void." The substance of the sections complained of is thus stated by the Court itself: "Before 1903 the following male citizens of the state, who are citizens of the United States, were entitled to register, viz: First. All who had served honorably in the enumerated wars of the United States, including those on either side in the 'war between the states.' Second. All lawful descendants of persons who served honorably in the enumerated wars or the War of the Revolution. Third. 'All persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government.' . . . After January 1, 1903, only the following persons are entitled to register: First. Those who can read and write any article of the Constitution of the United States in the English language, and who either are physically unable to work or have been regularly engaged in some lawful business for the greater part of the last twelve months, and those who are unable to read and write solely because physically disabled. Second. Owners or husbands of owners of forty acres of land in the state, upon which they reside, and owners or husbands of owners of real and personal estate in the state assessed for taxation at $300 or more, if the taxes have been paid, unless under protest. By S. 183 only persons qualified as electors can take part in any method of party action. By S. 184 persons not registered are disqualified from voting." As the primary purpose of the bill was to require the board of registrars to enroll upon the voting lists the plaintiff and a large number of other colored men, who had applied for registration before August 1, 1902, the Federal Circuit Court dismissed it for want of jurisdiction, and the Supreme Court affirmed the decree upon the ground that equity will not compel a county board of registrars to enroll a colored man on the voting lists as a duly qualified voter, under

Giles *v.* Harris.

Primary purpose of the bill.

[1] 189 U. S. 474 (1903).

the registration provisions of the Alabama Constitution, Article VIII, where the main object of the bill is to have these registration provisions, upon which the right to register is founded, declared void as a fraud upon the Federal Constitution because of discrimination against negroes, since, if that is the character of these provisions, the Court will not require officials to proceed to act under them.

Industrial education.

As a citizen of Alabama the author is proud of the noble record his state has made in the work of uplifting her colored population and preparing them, through industrial education, for the duties of full citizenship. As the head of one of her normal schools Booker T. Washington began and has continued that worthy and remarkable career as a promoter of industrial education which has been applauded by all good men. In the encouragement and assistance that has come to him from the North the hands of both sections have been clasped in advancing the only process through which the race problem can be finally solved. Born and reared in the midst of a colored population, the author knows that they are not lacking in the elements upon which good citizenship must be founded. Their conduct during the Civil War is an enduring memorial to their fidelity, while the steady advance of many of them as mechanics and small farmers proves that they are capable of thrift and industry. By just treatment, encouragement, and education they should be helped along the path to good citizenship. For many years such a work has been advancing hopefully in the County of Mobile, where an admirable public school system, supported almost entirely by taxes paid by the white population, has divided almost equally its benefits with the children of the colored people.

Solution of race problem.

# CHAPTER XII

## OUR COLONIAL SYSTEM AND THE MONROE DOCTRINE

Relation of a Greek colony to parent state.

To the Greek mind the state, as the city-commonwealth, was an organized society of men dwelling in a walled city, with a surrounding territory not too large to permit its free inhabitants habitually to assemble within its limits to discharge the duties of citizens.[1] When a conquering city extended its dominions by reducing other self-governing cities to the condition of dependent allies, such allies were often permitted to enjoy local autonomy under their own constitutions, without the right to participate in any way in the political affairs of the ruling state by whose assembly the foreign relations of the alliance, if alliance it may be called, were absolutely controlled. The most favored members of the Athenian Alliance or Empire, even Chios or Mitylene, could not have a voice in the general direction of the confederacy, for the simple reason that Greek exclusiveness rejected to the last the idea of a fusion of any large number of cities into a single body with equal rights common to all. As the state was the city, those who went out of the city went out of the state. Therefore according to Greek ideas, the effect of an emigration for the formation of a new settlement was an absolute political severance from the mother state, which retained no more substantial hold upon its colonies than the sentimental tie arising out of the community of blood and speech and common religious rights. Rome's relation to her colonies was entirely different, because no Roman colony was ever formed without the sanction and direction of the public authority. While the *Colonia Romana* differed from the *Colonia Latina*, in that the former permitted its members to retain their political rights intact, the colony, whether planted within

Relation of a Roman colony to parent state.

[1] Aristotle thought that a state should not be so large as to deny to its citizens the opportunity to become familiar with each other. Ἀναγκαῖον γνωρίζειν ἀλλήλους, ποῖοί τινές εἰσι, τοὺς πολίτας. *Pol.*, bk. vii, ch. iv, 13.

the bounds of Italy or in provinces like Britain or Gaul, remained an integral part of the Roman dominion.[1]

Modern conception of the state as nation.

The ancient conception of the state as the city-commonwealth gave way to the modern conception of the state as the nation, — an aggregation of people occupying a definite portion of the earth's surface with fixed geographical boundaries, the state as known to modern international law. That new creation was the outcome of the "process of feudalization" through which the Teutonic nations passed, after their settlements within the limits of the Roman Empire. The kings of the states that rose out of the wreck of the empire of Charles the Great were kings in the new territorial sense, who stood to the lands over which they ruled as a baron to his estate, a tenant to his freehold. The form assumed by the monarchy in France was reproduced in each subsequent dominion established or consolidated, and thus has arisen the state system of modern Europe, in which the idea of territorial sovereignty is the basis of all international relations. When the time came for states of the new type to send out bands of emigrants to found colonies in distant lands, an entirely new conception of the relation that should bind such colonies to the mother state came into existence. Instead of the emigrants leaving the mother state behind them, they were supposed to take it upon their backs. "The notion was, where Englishmen are, there is England, where Frenchmen are, there is France; and so the possessions of France in North America were called New France, and one group at least of the English possessions New England."[2] On that principle all the western hemisphere passed under the control of a colonial system of complete monopoly by mother countries, and as a general rule was excluded from direct communication with Europe, outside of the respective parent states. As colonies were a part of the mother country and yet transoceanic with reference to her, maritime commerce between them and foreign communities could by direct legislation be obliged first to seek the parent state,

Colonies of states of the new type.

A colonial system of complete monopoly.

[1] Roman colonies thus extended the language and laws of Rome over wide areas, inoculating the inhabitants of the provinces with more than the rudiments of Roman civilization. They were not merely valuable as *propugnacula* of the state, as permanent supports to Roman garrisons and armies.

[2] Seeley, *The Expansion of England*, 49.

which thus was made the distributing centre for both new exports and imports. By the middle of the seventeenth century the idea that Great Britain must dominate upon the sea had assumed such clear and definite form as to find expression in a series of measures generally known as the Navigation Acts, the first of which was passed in 1651, during Cromwell's Protectorate. From Adam Smith we learn that "the defense of Great Britain, for example, depends very much upon the number of its sailors and shipping. The Act of Navigation therefore very properly endeavors to give the sailors and shipping of Great Britain the monopoly of the trade of their own country. . . . The Act is not favorable to foreign commerce, nor to the opulence which can arise from that; but defense is of much more importance than opulence. The Act of Navigation is perhaps the wisest of all the commercial regulations of England."[1] A great thinker of our own has said that "the ninth of October, 1651, is the date of the passing of the Act, the general terms of which set for two hundred years the standard for British legislation concerning the shipping industry. The title of the measure, 'Goods from foreign ports, by whom to be imported,' indicated at once that the object in view was the carrying trade; navigation, rather than commerce. Commerce was to be manipulated and forced into English bottoms as an indispensable agency for reaching British consumers. At this time less than half a century had elapsed since the first English colonists had settled in Massachusetts and Virginia. The British plantation system was still in its beginnings alike in America, Asia, and Africa."[2]

Adam Smith and Navigation Acts of 1651.

Captain Mahan's view.

The history of modern colonization on a large scale begins with the Spanish conquests in America, where from the outset the sovereign was regarded as the fountain of all authority. An almost regal and absolute power was vested by special grants from the King in the persons sent to found the first governments in the New World. The India House at Seville[3] (*Casa*

Spain as a colonizer.

[1] *Inquiry into the Nature and Causes of the Wealth of Nations* (Rogers ed.), Oxford, 1880, 35–38. See also 178.

[2] Mahan, *Sea Power in its Relations to the War of 1812*, i, 14. See also, 9–11, and 23 *sq.*

[3] In order to enable it to superintend more conveniently the shipping to America, the *Casa de la Contratacion* was transferred to Cadiz in 1717.

*de la Contratacion*), established by an ordinance of 1503, with authority to grant licenses, to dispatch fleets, and to dispose of the results of trade and exploration, became subordinate to the Council of the Indies, created by Ferdinand in 1511 and fully organized by Charles V in 1524. The basis of the entire fabric was Spanish law, in the form that law had assumed after its codification in the *Siete Partidas*, which became fundamental in the colonies as in the mother country. Upon that general basis law was administered, subject to such local regulations and decrees as were promulgated by the Council of the Indies, whose bungling and often corrupt legislation soon filled its records with masses of contradictory and useless ordinances. Spain's colonial system, more paternal than that of England, retained in her hands the whole trade of the colonies, and guarded her monopoly with the severest penalties. The colonists, who were compelled to root up their vines and olives, were not allowed to raise or manufacture any article the mother country could supply. The prices of all European commodities were enhanced three, four, or even six fold. It was a vital part of that policy to bestow upon natives of the Peninsula all offices, from the highest to the lowest, in order to create an official and privileged caste, distinct from the people in feelings and interests.

*Siete Partidas.*

Oppression of colonists.

England as a colonizer.

While England was the last of the states of the new type to enter upon the work of colonization, she has been able to give it a wider extension than any of her competitors. According to the theory of the English Constitution, the title to all newly discovered lands accrued to the King in his public and regal character, and the exclusive right to grant them resided in him as a part of the royal prerogative; "upon these principles rest the various charters and grants of territory made on this continent." [1] The great title-deed under which the English settlers in America took actual and permanent possession of the greater part of the Atlantic seaboard is represented by the charter granted by James I, April 10, 1606, creating two distinct corporations as colonizing agents. "Within the period of ten years, under the last of the Tudors and the first of the Stuarts, two trading charters were issued to two companies of English adventurers. One of these charters is the root of English title

Great title-deed of April 10, 1606.

[1] Taney, C. J., in Martin et al. *v.* The Lessee of Waddell, 16 Peters, 409.

to the East and the other to the West. One of these companies has grown into the Empire of India; the other into the United States of North America."[1] In the latter it was declared "that all and every the persons, being our subjects which shall go and inhabit within the said colony and plantation, and every their children and posterity, which shall happen to be born within any of the limits thereof, shall have and enjoy all liberties, franchises, and immunities of free denizens and natural subjects within any of our other dominions, to all intents and purposes as if they had been abiding and born within this our realm of England or in any other of our dominions." It is not therefore strange that, under the principles of the English Constitution, a country subdued by an army of the Empire becomes immediately a part of the King's dominions in right of his crown, and its inhabitants, so soon as they pass under the King's protection, cease to be enemies or aliens and become subjects. In a word, foreign territory becomes a part of the British Empire and its inhabitants British subjects, both as to the conquering state and foreign nations, *ipso facto*, by the conquest itself, without any enabling or confirming legislation upon the part of the Imperial Parliament. As Lord Coke declared in Calvin's case, "they that were born in those parts of France that were under actual ligeance and obedience were no aliens, but capable of, and heritable to, lands in England."[2]

Its terms as to citizenship.

Effect of conquest.

Calvin's case.

The liberality with which the English Constitution thus bestows citizenship and legal rights upon those under its dominion in foreign lands has ever been more than offset by the exclusive spirit, sanctioned by all the precedents of the past, that denies to all colonists the right to representation in the sovereign assembly at home which directs the affairs of the Empire as a whole. That assembly, while denying to all colonists, as every other home assembly had denied, the boon of being heard through their representatives, has ever claimed the right to invade the jurisdiction of all colonial assemblies in order to legislate directly upon internal colonial concerns. In the hands of a practical, tax-loving statesman like Grenville, that claim was not confined to mere supervision; in such hands, it was held to

Colonists denied representation in home assembly.

[1] Bryce, *American Commonwealth*, i, 430.

[2] *State Trials*, ii, 559. As to the status of the *post-nati*, cf. *Origin and Growth of the English Constitution*, ii, 227–229.

Cause of War of the Revolution.

mean that the Imperial Parliament could at any moment override the acts of the colonial assemblies, without consulting their wishes at all, and tax and legislate for the people of Massachusetts and Virginia just as it could for the people of Kent and Middlesex. Out of the conflict that finally arose between the English and colonial theories, as to the practical omnipotence of the Imperial Parliament over self-governing communities beyond the four seas, grew the War of the Revolution, and the severance of the English colonies in America from the mother state.

Our denial of representation to colonists.

When the time came for this nation to establish a colonial system it revived that exclusive spirit, as old as civilization itself, which denies to colonists the right to speak through representatives in the assembly of the mother state. The signing of the first Federal Constitution, embodied in the Articles of Confederation, was not completed until March 1, 1781, when Maryland finally gave it her adhesion, after it was settled that the new nationality was to become the sovereign possessor of "the whole Northwestern Territory — the area of the great states of Michigan, Wisconsin, Illinois, Indiana, and Ohio (excepting the Connecticut Reserve),"[1] which, under the Articles of Confederation, it had no express right either to hold or govern. Notwithstanding that fact, Congress, acting under authority clearly implied, boldly entered upon the scheme of colonial or territorial government embodied in the Ordinance of 1787 for the government of the Northwest Territory. In describing that famous enactment, an eminent American historian has said: "It was our first effort at colonial government, our first attempt to rule a community not fit to become a state and enter the Union; and by it a new political institution, the territory, was created in two grades. At the head of the committee which reported the Ordinance was the apostle of liberty, the father of the American democracy, the man who wrote the Declaration of Independence. If one member more than another of that committee was bound to carry out the principles of the Declaration and seek to establish a government in strict accordance with them, that member was Jefferson. If any one man more than another could be pardoned for attempting to carry the self-evident truth to an extreme, Jefferson was that

Scheme embodied in Ordinance of 1787.

Jefferson head of committee.

[1] Fiske, *The Critical Period*, 194.

man. Yet not for a moment was he led astray by the ideals he had announced to the world as the true basis of democratic government. He and his fellow members knew well that no popular government can stand long or accomplish much for the good of the governed which is not carefully adjusted to the wants, conditions, and intelligence of the people who are to live under it. The plan presented and adopted, therefore, did not contain one vestige of self-government till there were five thousand free white males living in the territory, and this in spite of the fact that the great majority of them would be citizens from the seaboard states, and well accustomed to self-government. . . . The clear distinctions between the state and a territory, thus drawn at the very outset of our career, and the principles then established — that Congress was free to govern the dependencies of the United States in such a manner as it saw fit; that the government it granted need not be republican, even in form; that men might be taxed without any representation in the taxing body, stripped absolutely of the franchise, and ruled by officials not of their own choice, have never been departed from, and have often been signally confirmed."[1] In a word, Jefferson was as hostile to the idea that the colonists who grouped themselves in the territories of the United States were entitled, while in that condition of probation, to the full benefits of our Federal Constitution, as Grenville ever was to the idea that the English colonists in America were entitled to the full benefits of the Constitution of the mother country. When the opportunity was presented to Jefferson to design a system of colonial or territorial government for inhabitants of contiguous territory, drawn in the main from the seaboard states, he was unwilling to concede representative government at all until there were at least five thousand free white males living in the territory. When the settlers reached that number, any free white man who had resided there the proper time, and who owned fifty acres, might take part in the election of a House of Representatives, every member of which must be possessed of a freehold of two hundred acres. Such House when assembled was authorized to nominate ten men, each possessed of a freehold of five hundred acres, of whom the President was required to commission five as legislative councillors. The

No self-government at outset.

Distinctions between state and territory.

Agreement between Jefferson and Grenville.

[1] Prof. J. B. McMaster, in *The Forum* of December, 1898.

House and Council so constituted could by joint ballot choose a delegate to represent the territory in the national House of Representatives, where he was permitted to speak, but not to vote. This oligarchical form of territorial government, created by the Continental Congress, and adopted by the First Congress under the Constitution, became the standard after which all others since established have been closely modeled. Jefferson, with the words of the Declaration of Independence fresh upon his lips, was no more inclined to extend the national Constitution, the special possession of fully organized states, to his brethren settled in our colonies or territories, than was Pericles to extend the Constitution of Athens to Chios or Mitylene, or Grenville the Constitution of England to the colonists settled along our Atlantic seaboard. It never occurred to Pericles, Grenville, or Jefferson that the principles of human right demanded or justified such an extension. That idea, which finds no support in the world's past history, first found expression in the baseless and fanciful outcry that "the Constitution follows the flag."

Original scheme standard for imitation.

A fanciful outcry.

Strange it is indeed that the makers of the existing Constitution should have dismissed the vast subject involved in the acquisition and government of colonies or territories with the brief provision contained in Article IV, Section 3, to the effect that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States." When, in 1803, Jefferson was confronted with the lack of express power to purchase Louisiana, he fell back, after a momentary hesitation, upon the implied power necessarily incident to the nature of the government itself. After that vast and indefinite domain was taken from Napoleon for a song, it was divided; and a part, corresponding very nearly to the present State of Louisiana, was called the "Territory of Orleans." To the new territory thus formed an oligarchical form of government was given by Congress but little in advance of that devised in the first instance by Jefferson for the Northwest Territory. Even the right of trial by jury was conceded with a serious restriction. During the debate on the treaty under which Louisiana was purchased, the question was raised that a discrimination was made in favor of New Orleans as against Charleston or New York, by

Purchase of Louisiana, 1803.

Territory of Orleans.

the provision which permitted ships coming from France or Spain to enter the ports of Louisiana, during a period of twelve years, without paying more duty than was exacted from vessels belonging to citizens of the United States. Such a discrimination, it was said, conflicted with Article 1, Section 9, of the Constitution, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." The short and conclusive answer to that objection was that, as the prohibition in question related only to the states and not to the territories, any preference that might be given to the port of Louisiana was not invalid, because Louisiana was a territory and not a state.[1]

Territorial ports.

When for a second time our domain was widened by the acquisition of Florida, under the treaty with Spain ratified October 20, 1820, Congress, again refusing to extend the constitutional guarantees to a territory, gave to the new acquisition in 1822 substantially the same form of government provided for Orleans in 1804. In the case of the American Ins. Co. *v.* 356 Bales of Cotton,[2] the question was presented to the Supreme Court whether or no that part of the territorial government providing that the judges of the Superior Court of Florida should hold their offices for four years conflicted with that provision of the Constitution declaring that "the judges of the supreme and inferior courts shall hold their offices during good behavior." In delivering the opinion, Chief Justice Marshall said that the Court "should take into view the relation in which Florida stands to the United States"; that territory ceded by treaty "becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or *on such as its new master shall impose.*" He further held that the judicial clause in question had no application whatever to the organization of territorial courts, because Florida, upon the conclusion of the treaty, became a territory of the United States, and subject to the power of Congress legislating under the territorial clause, and entirely outside of the constitutional guarantees which belong to the states alone.

Florida purchase, 1820.

Tenure of territorial judges.

[1] Speaking for the Administration, Mr. Nicholson of Maryland said: "[Louisiana] is in the nature of a colony whose commerce may be regulated without any reference to the Constitution." See Downes *v.* Bidwell, 182 U. S. 255.

[2] 1 Peters, 511.

Treaty of Guadalupe-Hidalgo, 1848.

When for a third time our domain was widened by the acquisition, in 1848, under the treaty of Guadalupe-Hidalgo, of the vast region inhabited by people of mixed races, with laws and customs unlike our own, the problem of territorial government became entangled with an effort to extend the limits within which slavery could be maintained. In the course of the debate that ensued on an amendment to a certain bill offering to extend the Constitution and certain laws of the United States over the proposed territories of Utah and New Mexico, a scene occurred of which Mr. Benton[1] gives us the following description: "The novelty and strangeness of this proposition called up Mr. Webster, who repulsed as an absurdity and an impossibility the scheme of extending the Constitution to the territories, declaring that instrument to have been made for states, not territories; that Congress governed the territories independently of the Constitution and incompatibly with it; that no part of it went to a territory but what Congress chose to send; that it could not act of itself anywhere, not even in the states for which it was made, and that it required an act of Congress to put it in operation before it had effect anywhere. Mr. Clay was of the same opinion, and added: 'Now, really I must say the idea that, *eo instanti*, upon the consummation of the treaty, the Constitution of the United States spread itself over the acquired territory and carried along with it the institution of slavery, is so irreconcilable with any comprehension or any reason I possess, that I hardly know how to meet it.'"

Webster and Clay declare Constitution belongs to states alone.

Taney in Fleming *v.* Page.

In 1850, the year following that in which the foregoing debate occurred, the Supreme Court delivered its judgment in Fleming *v.* Page,[2] a case arising out of an action brought against the collector of the port of Philadelphia to recover back certain duties on merchandise imported into that port from Tampico, in Mexico, during the temporary occupation of that place by the military forces of the United States. The substance of the opinion, delivered by Chief Justice Taney, is as follows: "The President acted as a military commander prosecuting a war waged against a public enemy by the authority of his government, and the conquered country was held in possession in order to distress and harass the enemy. It did not thereby become a part of the Union. The boundaries of the United States

[1] *Thirty Years' View*, ii, 729 *sq.* [2] 9 Howard, 603.

were not extended by the conquest. Tampico was therefore a foreign port, within the meaning of the Act of Congress passed on the 30th of July, 1846, and duties were properly levied upon goods imported into the United States from Tampico. The administrative departments of the government have never recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by an Act of Congress, and the principle thus adopted has always been sanctioned by the Circuit Courts of the United States, and by this Court." By that time the following propositions had become firmly settled in the constitutional law of this country: (1) That when territory is subdued by the armies of the United States, it passes under the despotic war power of the President, as Commander-in-Chief, who, in the exercise of that power, is unrestrained by the Constitution and the laws of the United States; (2) that when territory is thus acquired by conquest, its holding is a mere military occupation until, by a treaty of peace, the acquisition is confirmed; (3) that when the new acquisition passes into a territorial condition, the despotic war power vested in the President, as Commander-in-Chief, is superseded by the power of Congress, which is equally unlimited, except as to such constitutional "provisions as go to the very root of the power of Congress to act at all, irrespective of time or place"; (4) that until the ceded territory is admitted as a state, it is not drawn within the circle of constitutional guarantees which apply, in their entirety, to states alone. When in 1879 it again became necessary to determine the extent to which the Constitution applies to a territory, the Supreme Court, in First National Bank of Brunswick *v.* County of Yankton,[1] speaking through Chief Justice Waite, thus answered: "The territories are but political subdivisions of the outlying dominion of the United States. They bear much the same relation to the General Government that counties do to the states, and Congress may legislate for them as states do for their respective municipal organizations. The organic law of a territory takes the place of a constitution, as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and, for purposes of this department

Tampico a foreign port.

Summary of constitutional law.

Chief Justice Waite's view.

[1] 101 U. S. 129.

of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution."

Insular Tariff cases.

With all the fundamentals thus clearly defined in harmony with the past history of the world as to the relation of colonies to the constitution of the parent state, there was really no occasion for the great forensic contest and subsequent conflict among the judges which assumed such large proportions in what are known as the Insular Tariff cases,[1] the most important of which are DeLima *v.* Bidwell and Downes *v.* Bidwell.

DeLima *v.* Bidwell.

In the first, the question was this: Was the island of Porto Rico, after the treaty with Spain for the transfer of sovereignty had been ratified and proclaimed, and prior to any action by Congress in regard to the island, a part of the territory of the United States, and subject to that provision of the Constitution which declares that "all duties, imports and excises shall be uniform throughout the United States"? It was held that, at the time the duties in question were levied, "Porto Rico was not a foreign country, within the meaning of the tariff laws, but a territory of the United States; that the duties were illegally exacted, and that the plaintiffs are entitled to recover them back." In the second, the same question arose, after the passage, on April 12, 1900, of the Foraker Act, which provided for a territorial government in Porto Rico and levied a duty upon such products of the island as might be brought into the United States. When the question of the validity of the duty so imposed arose, it was held to be valid, regardless of the uniformity clause of the Constitution, because, in the opinion of Mr. Justice Brown, who delivered the judgment, the Constitution does not, by its own force, extend to the possessions of the United States, whether created into territories with a regular form of government, or existing as unorganized possessions. As a qualification of that statement, that ever sane and luminous judge said: "To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time

Downes *v.* Bidwell.

Limitations on power of Congress to act at all.

[1] 182 U. S. 1, 244 (1900).

or place, and such as are operative only 'throughout the United States' or among the several states. Thus when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill of that description. . . . Upon the other hand, when the Constitution declares that all duties shall be uniform 'throughout the United States,' it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the 'United States,' by which term we understand the *States* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them." It would seem that such expositions leave really nothing for future controversy as to the relations existing between our colonies or territories and the Constitution, which, in its entirety, belongs to the states alone.

Spain's colonial monopoly.

The statement has been made already that Spain's colonial system, more paternal than that of England, rested on a commercial policy most irrational and intolerable in its restrictions and repressions. Spain retained in her own hands the entire trade of her colonies, a monopoly which she guarded with the severest penalties. When during the Napoleonic wars she lost control of her American possessions, British merchants slipped into the prohibited domain and built up a trade of great value.

Britain's commercial conquest imperiled.

That commercial conquest upon the part of Great Britain was seriously imperiled when, in the summer of 1823, the Holy Alliance notified her that, so soon as France should complete the overthrow of the revolutionary government of Spain, a congress would be called for the purpose of terminating the revolutionary governments in South America, which had then been recognized by the United States but not by Great Britain.[1] In order to thwart that design, — whose success involved of course a surrender to Spain of the monopoly of the valuable trade then enjoyed with her emancipated colonies, — Great Britain opened a diplomatic negotiation with this country out of which grew the doctrine now generally known as the

[1] When in 1825 Canning formally recognized the independence of such governments, his intention is said to have been to seek compensation for the preponderance of France in the Peninsula by "calling the New World into existence to redress the balance of the Old." Alison, *History of Europe from the Fall of Napoleon*, ii, 715 *sq.*

Real origin of Monroe Doctrine.

Monroe Doctrine. The fact is that the attempt made by those who claimed the right to exercise a primacy or overlordship in the affairs, external and internal, of European states to extend that system of interference to American republics forced the government of the United States, as the dominant political power in this hemisphere, to assert that in itself alone resides a primacy or overlordship, which has gradually become as well defined in the New World as that of the Concert of Europe in the Old.

Castlereagh superseded by Canning;

Castlereagh, who was regarded as too much in sympathy with the Holy Alliance, yielded the direction of England's foreign affairs to Canning, who came forward as an advocate of the universal right of self-government, and as an opponent of France's invasion of Spain, just in time to deal with the momentous question presented by the threat of the Alliance to extend its interference to Spain's relations with her colonies in South America. In order to deal with that design, so full of menace to the interests of English merchants, Canning, in the summer of 1823, began to correspond with Mr. Rush, the American Minister at London, as to the advantages of a joint declaration by Great Britain and the United States against the proposed European intervention. So soon as President Monroe received that correspondence he submitted it to Jefferson, then in retirement, with the request that he would advise him in the matter. On the 24th of October, Jefferson in his letter from Monticello said, among other things, that "the question presented by the letters you have sent me is the most momentous which has been offered to my contemplation since that of Independence. That made us a nation; this sets our compass and points the course which we are to steer through the ocean of time opening on us. And never could we embark upon it under circumstances more auspicious. Our first and fundamental maxim should be never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with cis-Atlantic affairs. America, North and South, has a set of interests distinct from those of Europe, and peculiarly her own. She should, therefore, have a system of her own, separate and apart from that of Europe. . . . One nation, most of all, could disturb us in this pursuit; she now offers to lead, aid, and accompany us in it. By acceding to her proposition we detach

his correspondence with Rush, 1823;

submitted by Monroe to Jefferson.

An American system defined.

her from the bands, bring her mighty weight into the scale of free government, and emancipate a continent at one stroke, which might otherwise linger in doubt and difficulty. Great Britain is the nation which can do us the most harm of any one or all on earth, and with her on our side we need not fear the whole world. With her, then, we should most sedulously cherish a cordial friendship, and nothing would tend more to knit our affections than to be fighting once more side by side in the same cause."

Control of Gulf of Mexico and acquisition of Cuba.

Then, passing to another branch of the subject confronting us at our very doors, he said: "But we have first to ask ourselves a question. Do we wish to acquire to our own confederacy any one or more of the Spanish provinces? I candidly confess that I have ever looked on Cuba as the most interesting addition which could ever be made to our system of states. The control which, with Florida Point, this island would give to us over the Gulf of Mexico and the countries and isthmus bordering on it, as well as all those whose waters flow into it, would fill up the measure of our political well-being. Yet, as I am sensible that this can never be obtained, even with her own consent, but by war, and its independence, which is our second interest (and especially its independence of England), can be secured without it, I have no hesitation in abandoning my first wish to future chances, and accepting its independence, with the peace and friendship of England, rather than its association at the expense of war and her enmity."[1] Madison, who was consulted at the same time through Jefferson, gave his cordial approval to Canning's suggestion,[2] and Calhoun, who was Secretary of War at the time, declared that he believed that the Alliance "had an ultimate eye to us; that they would, if not resisted, subdue South America. . . . Violent parties would arise in this country, one for and one against them, and we should have to fight upon our shores for our institutions."

Approval of Madison and Calhoun.

Thus advised, President Monroe in his message of December 2, 1823, said to Congress that "in the wars of the European powers, in matters relating to themselves, we have never taken any part, nor does it comport with our policy to do so. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the

[1] *Jefferson's Works*, vii, 315. [2] *Madison's Writings*, iii, 339.

European system not to be extended to this hemisphere.

movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective governments. And to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety.

No interference with existing colonies.

With the existing colonies or dependencies of any European power we have not interfered, and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States. . . . It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can any one believe that our Southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference. If we look to the comparative strength and resources of Spain and those new governments, and their distance from each other, it must be obvious that she can never subdue them."

At an earlier stage of his message, in a paragraph (7) far removed from the two (48 and 49) from which the foregoing extract was taken, President Monroe had expressed himself in the same general way in reference to a subject having no connection whatever with the intervention of the Holy Alliance in the affairs of South America. The first declaration — relating to fresh acquisitions of territory by European powers in any portion of the American continents by occupation or coloniza-

tion — was prompted by a controversy as to unsettled boundaries in the Northwest that grew out of a ukase issued by the Czar of Russia in September, 1821, in which he had asserted exclusive territorial rights from the extreme northern limit of the continent to the fifty-first parallel of north latitude, by attempting to exclude foreigners from fishing and navigation for the purposes of commerce within an hundred Italian miles of the coast down to that parallel. Against that ukase both Great Britain and the United States protested because an unsettled controversy was then pending between them as to the very territory to which the Czar thus laid claim. When Russia proposed an amicable settlement of the matter, John Quincy Adams, then Secretary of State, said to the Russian minister, at a conference held on July 17, 1823, "that we should contest the right of Russia to *any* territorial establishment on this continent, and that we should assume distinctly the principle that the American continents are no longer subjects for any *new* colonial establishments."[1] In the part of the message in question, President Monroe restated the matter in this form: "The occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for *future colonization* by any European powers." Such are the two foundations, relating to two entirely distinct subject-matters, of what is generally known as the Monroe Doctrine (the joint product of the brains of Jefferson and Adams) — a doctrine which has gradually reached its present dimensions through more than eighty years of persistent development.

Unsettled boundaries in the Northwest. Ukase of September, 1821.

J. Q. Adams's declaration of July 17, 1823.

Pending the controversy with Great Britain as to the Oregon territory, and in the face of possible intervention by the European powers on account of the annexation of Texas, President Polk, in his message of December 25, 1845, greatly widened

President Polk's message of December 25, 1845.

[1] J. Q. Adams's *Memoirs*, vi, 163. On July 2, Mr. Adams had written to Mr. Rush, our minister at London, that a "necessary consequence of this state of things will be, that the American continents henceforth will no longer be subject to colonization. *Occupied by civilized nations*, they will be *accessible to Europeans and each other on that footing alone.*" For a more complete statement of the entire subject, see Taylor, *International Public Law*, vi.

the protest of President Monroe against "future colonization by any European powers," when he said that "it should be distinctly announced to the world as our settled policy, that no future European colony or dominion shall, with our consent, be planted or established on any part of the North American continent." The step backward, taken at the making of the Clayton-Bulwer treaty of 1850, — in which the United States did enter into an alliance or combination with a European power for the settlement of questions connected with interests in this hemisphere, — was more than regained when in December, 1865, it became necessary for the Government of the United States to terminate the intervention of France in the internal affairs of Mexico. Notice was then given that friendship with that country must cease, "unless France could deem it consistent with her interest and honor to desist from the prosecution of armed intervention in Mexico to overthrow the domestic republican government existing there, and to establish upon its ruins the foreign monarchy which has been attempted to be inaugurated in the capital of that country."[1]

Clayton-Bulwer treaty, 1850.

France's intervention in Mexico.

Not, however, until a resolute and far-sighted statesman, who clearly understood that our marvelous national development entitled us to rank as a world-power, was given the opportunity by the boundary controversy between Great Britain and the Republic of Venezuela, was the inevitable declaration finally made, that the same reasons that impel the Concert of Europe to guard the balance of power in the Old World prompt the government of the United States to maintain alone its primacy in the New. In his special message[2] to Congress of December 17, 1895, President Cleveland, after referring to the contention of the British prime minister that the Monroe Doctrine had been given "a new and strange extension and development," said that "without attempting extended argument in reply to these positions, it may not be amiss to suggest that the doctrine upon which we stand is strong and sound, because its enforcement is important to our peace and safety as a nation and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form of govern-

Definition of Monroe Doctrine completed by President Cleveland.

[1] Mr. Seward, Secretary of State, to Mr. Bigelow, Dec. 16, 1865; MSS. Inst., France.

[2] *Messages and Papers of the Presidents*, ix, 655.

ment. It was intended to apply to every stage of our national life and cannot become obsolete while our Republic endures. *If the balance of power is justly a cause for jealous anxiety among the governments of the Old World, and a subject for our absolute non-interference, none the less is an observance of the Monroe Doctrine of vital concern to our people and their government. . . .* The Monroe Doctrine finds its recognition in those principles of international law[1] which are based upon the theory that every nation shall have its rights protected and its just claims enforced." The italicized words embody the first scientific statement of the real and only ground upon which the Monroe Doctrine can be sustained as a matter of international law. The soundness of that position Great Britain justly and frankly recognized when she conceded the right of arbitration, then asserted by the United States, solely by virtue of its primacy or overlordship in the New World.[2] It is folly to contend that that primacy as it exists to-day is just what it was when originally formulated by President Monroe. As "it was intended to apply to every stage of our national life and cannot become obsolete while our Republic endures," it has grown with our growth, and now stands ready to adapt itself to all future developments. The marvel to students of the American Constitution is that the upbuilding of the primacy of the United States in the New World has been worked out by the pens of Presidents and Secretaries of State, — it is purely a creation of the executive power.

Balance of power in Old World and New.

Passing as we are under the influence of forces which are

[1] "The supremacy of a Committee of States and the supremacy of a single State cannot be exercised in the same manner. What in Europe is done after long and tedious negotiations, and much discussion between representatives of no less than six countries, can be done in America by the decision of one Cabinet discussing in secret at Washington." T. J. Lawrence, *The Principles of International Law* (1898), p. 247.

[2] That the statesmen of Great Britain perfectly understood at the time the magnitude of the concession clearly appears from the following: "From the point of view of the United States the arrangement is a concession by Great Britain of the most far-reaching kind. It admits a principle that in respect of South American republics the United States may not only intervene in disputes, but may entirely supersede the original disputant and assume exclusive control of the negotiations. Great Britain cannot, of course, bind any other nation by her action, but she has set up a precedent which may in future be quoted with great effect against herself." *London Times*, November 14, 1896.

Diplomatic relations with the Orient.

rapidly making us a part of the growing greatness of the Pacific, it is impossible not to perceive that the pens of Presidents and Secretaries of State are seriously at work defining our attitude toward the diplomacy of the Orient, in which we are already deeply involved. When in 1823 Jefferson wrote to Monroe, "I candidly confess that I have ever looked on Cuba as the most interesting addition which could ever be made to our system of states. The control which, with Florida Point, this island would give to us over the Gulf of Mexico and the countries and isthmus bordering on it, as well as all those whose waters flow into it, would fill up the measure of our political well-being" — he clearly foresaw that our sphere of influence was soon to be extended over the Gulf of Mexico, the Caribbean Sea, "and the countries and isthmus bordering on it." If the building of the canal was not expressly mentioned, such an event was no doubt contemplated by a mind whose prescience was almost supernormal. At that time Great Britain, then drawing one fourth of her commerce from the West Indies, was a rival at our very doors. To-day her fleet has been practically removed from the Caribbean Sea. Since the close of the Spanish-American War, Cuba, Porto Rico, and the Philippines have passed under our actual control, while over the whole of Central and South America our hegemony has been extended as never before. In order to defend the widely-scattered possessions thus acquired from Spain, it has become necessary not only to construct the isthmian canal but to enter into new diplomatic understandings that have made the old maxim of "no entangling alliances" an anachronism. Just before his death, Sir William Hunter, a profound student of Asian questions, wrote: "I hail the advent of the United States in the East as a new power for good, not alone for the island races that come under her care, but also in that great settlement of European spheres of influence in Asia, which, if we could see aright, forms the world problem of our day."

Our hegemony in Central and South America.

Population and trade of the Orient.

In estimating the magnitude of that problem, we must remember that more than half of the population of the world are of Oriental descent, and Oriental customs of life; and that of that 800,000,000 or 900,000,000 China furnishes 400,000,000, India 300,000,000, — their imports being estimated at some $2,000,000,000 a year. In that vast and growing trade, about

two thirds of which now comes from Europe, the United States is resolved to participate. An acute observer,[1] who has recently examined conditions on the ground, has well said: "Even if we were not in control of the West Indies, and in the Philippine Islands, our position as guardians of the Panama Canal, and as sponsors for the safety from aggression of the South American Republics, and our position on the Pacific Ocean, force us to play a part in the East. A nation, like an individual, must grow or die. It is true that our first concern is with matters at home. How a man will run, how he will think even, depends not a little on the condition of his heart. Our progress and prowess in the East depend, as is the case with England, upon our moral fibre at home. . . . He travels with eyes and ears sealed who does not become convinced that this century is not concerned as were the sixteenth and seventeenth with religious struggles, as was the eighteenth with the rights of man, as was the nineteenth with questions of nationality. The twentieth century even now is characterized by a struggle for existence in the field of commerce and industry."

A nation must grow or die.

Foremost among the nations that must struggle for commercial and industrial expansion or perish is the dominant military power of Europe, Germany, with a territory smaller than that of Texas and with a population of more than 60,000,000 which she can feed for only about two thirds of the year. In the same situation is Japan, which lies off the east coast of Asia as the British Isles lie off the west coast of Europe, with about the same geographical area. Japan has a population of 317 to the square mile, while Great Britain, with a smaller area than Colorado, has a density of 470, England alone having a density of 605. Since the granting of two trading charters, "within the period of ten years, under the last of the Tudors and the first of the Stuarts," [2] Great Britain has expanded into the British Empire, which now governs 400,000,000 people occupying a total area of 11,500,000 square miles. Rich as Great Britain is, with a yearly governmental expenditure of $1,000,000,000, with

Germany and Japan.

Expansion of Great Britain.

[1] See the lucid article of Mr. Price Collier, entitled "On the Way to India," in *Scribner's Magazine* for January, 1911, containing many interesting statistics. The author has profited by some of them.

[2] See above, p. 380.

a national debt of $3,800,000,000, with her birth-rate diminishing, and her workmen emigrating for lack of employment at home, — she cannot for a moment suspend the struggle for existence in the field of commerce and industry. If she loses her supremacy at sea, and with it the Suez Canal and India, she must suffer the fate of Venice, Spain, Holland, or Denmark. Next to our own affairs, those of Great Britain are of the deepest concern to us.

Expansion of the United States.

The thirteen states and two territories, founded in the main by English settlers on our Atlantic seaboard, began their career as a nation with a population of 3,673,572, occupying a total area of 843,255 square miles, with the Mississippi River as its western boundary. The outcome of the migration which has swept westward from that beginning, first to the Pacific Coast and then beyond it, is a population now estimated at 101,100,000, occupying a total area of 3,747,381 square miles. As late as 1852 the vast expanse of territory between the Mississippi and the Pacific was almost an unknown land. The only states then organized within it were Louisiana, Arkansas, Texas, Missouri, and California, the last a string of mining-camps with a population of about 90,000. Oregon, Washington, and British Columbia contained only a few scattered settlements and trading-stations, from which there were practically no exports but furs, while Mexico, Central America, and the Pacific States of South America, then recently emancipated from Spain, were still hampered by internal dissensions, and the traditionally incompetent commercial methods of the old Spanish colonial system. The uncertain movements of the whaling-ships around Cape Horn were almost the only means of communication between Honolulu and the outside world; the Australian colonies were upon the threshold of their career, giving only a slight suggestion of the mighty development of wealth soon to come; China had very recently been forced to open a few of her ports to foreign commerce; while Japan, still a sealed mystery, rigorously excluded foreigners, and made it a capital offense for any native to leave the country. Not until 1857–58 were the three ports of Nagasaki, Kanagawa, and Hakodadi opened to foreigners. Except when adventurous traders intruded for the purpose of obtaining a few furs in exchange for fire-water and trinkets, Alaska and the Siberian coast of Asia were in the un-

The shores of the Pacific in 1852.

disturbed possession of the seal and Eskimo.[1] At that juncture, — when steamships were still a curiosity in many parts of the Pacific, when there were no railroad tracks or telegraph lines west of the Mississippi, when trade, commerce, and shipping in that quarter were meagre indeed, — a great American statesman, destined to exercise an immense influence upon our foreign affairs, foretold in a prophetic speech all that was to come.

Mr. Seward's prophetic speech, July 29, 1852.

When on July 29, 1852, a motion was made in the Senate of the United States to proceed to the consideration of a bill "authorizing an exploration and reconnoissance of the courses of navigation used by whaling-vessels in the regions of Behring's Straits, and also of such parts of the China Sea, Straits of Gaspar, and Java Sea, as lie directly in the route of vessels proceeding to and from China," William H. Seward[2] of New York said: "The settlement of the Pacific Coast is in a state of sheer infancy. . . . Without waiting for perfect or safe channels, a strong and steady stream of emigration flows thither from every state and every district eastward of the Rocky Mountains. Similar torrents of emigration are pouring into California and Australia from the South American states, from Europe, and from Asia. This movement is not a sudden or accidental, or irregular, or convulsive one, but it is one for which men and nature have been preparing through near four hundred years. During all that time merchants and princes have been seeking how they could reach, cheaply and expeditiously, 'Cathay,' 'China,' 'the East,' that intercourse and commerce might be established between its ancient nations and the newer ones of the West. To these objects Da Gama, Columbus, Americus, Cabot, Hudson, and other navigators, devoted their talents, their labors, and their lives. Even the discovery of this continent and its islands, and the organization of society and government upon them, grand and important as these events have been, were but conditional, preliminary, and ancillary to the more sublime result, now in the act of consummation — the reunion of the two civilizations, which having parted on the plains of Asia four thousand years ago, and hav-

The path to the East.

Reunion of two civilizations.

[1] For a larger statement see a notable article entitled "The Growing Greatness of the Pacific," by Lorrin A. Thurston, then Hawaiian Minister at Washington, which appeared in the *North American Review* for April, 1895.

[2] See the *Congressional Globe*, 32d Congress, 1st sess., part 3, p. 1975.

ing traveled ever afterwards in opposite directions around the world, now meet again on the coasts and islands of the Pacific Ocean. Certainly no mere human event of equal dignity and importance has ever occurred upon earth. It will be followed by the equalization of the condition of society and the restoration of the unity of the human family. . . . As for those who doubt that this great movement will quicken activity and create wealth and power in California and Oregon, I leave them to consider what changes the movements, similar in nature but inferior in force and slower in effect, have produced already on the Atlantic Coast of America. As to those who cannot see how this movement will improve the condition of Asia, I leave them to reflect upon the improvements in the condition of Europe since the discovery and colonization of America. Who does not see, then, that every year hereafter, European commerce, European politics, European thought, and European activity, although actually gaining greater force, and European connections, although actually becoming more intimate, will, nevertheless, ultimately sink in importance; while the Pacific Ocean, its shores, its islands, and the vast regions beyond, will become the chief theatre of events in the world's great Hereafter."

Influence on Asia.

Since that prophecy was made, we have extended our dominion over large groups of islands in the Pacific Ocean, and our diplomatic influence to the mainland beyond. Recently a suggestion proceeded from Washington that the six great powers should control the railway situation in northern and southern Manchuria, and on July 4, 1910, Russia and Japan signed an agreement providing for "friendly coöperation with a view to the improvement of their respective railway lines in Manchuria and the perfecting of the connecting services of the said lines, and to abstain from all competition prejudicial to the realization of this object." Thus the United States is already involved in the world problems presented by the awakening Orient, where the struggle for existence in the field of commerce and industry is being carried on by all of the expanding nations. A traveler in the Far East, who has made its problems a special study, wrote thus in 1906: "Recently, in discussing the present situation in the Orient with a foreigner long distinguished by his association with events in that part of the world,

United States already involved in Oriental problems.

I asked him what in his opinion is the greatest force applicable in the readjustment which must follow the war between Russia and Japan. 'Public opinion in America and England,' he replied without hesitation."[1] The two English-speaking democracies — exercising dominion over 15,247,381 square miles, occupied by a population estimated at 500,000,000 — are now face to face with one of the gravest problems that has ever arisen in the history of civilization. The tremendous armaments now being prepared by the advancing nations are not for mere military display. The necessity that compels them is hidden from the eyes of the humane dreamers of the cloister who imagine that, by common consent, they may be reduced or laid aside. The best prospect for peace lies in a firm alliance between the two great branches of English-speaking peoples, whose moral and physical authority, backed by the growing influence of international arbitration, may be able to avert a world-wide conflict. Such is the mission confronting the statesmen and diplomatists who wield to-day the mighty forces vested by the English and American democracies in their respective constitutions.

Influence of public opinion in America and England.

[1] *The New Far East*, by Thomas F. Millard, 6–7.

# CHAPTER XIII

## INTERSTATE COMMERCE, TRUSTS, AND MONOPOLIES

Transition from individualism to collectivism.

If Savigny was right when he said that law is the natural outcome of the consciousness of a people, like their social habits or their language, and as such is simply an aspect of the national life, then the causes of radical changes in law must be sought in corresponding changes in the inner history of the people themselves. Only by that process is it possible to explain the transformation in legal ideas that has followed the transition in this country from the primitive individualism, in which each citizen was surrounded by a wide circle of individual rights practically free from the intrusion of state power, to the existing condition of collectivism in which the rapidly multiplying functions of state power are everywhere intruding and narrowing the circle of individual rights. As all the world knows, it was the Laudian persecution of the Puritans through the machinery of the State Church that forced them to "turn to the New World to redress the balance of the Old." As the first terrors of the persecution died down, there was a lull for a while in the emigration. But so soon as the pressure of the state despotism, religious and political, made itself felt again, the "godly people in England began to apprehend a special hand of Providence in raising this plantation" in Massachusetts; "and their hearts were generally stirred to come over." Despite the news of hardships and dangers, as years went by and the contest grew hotter at home, the number of emigrants rose fast. In a single year three thousand new colonists arrived from England; and between the sailing of Winthrop's expedition and the meeting of the Long Parliament, that is, within the space of ten or eleven years, "two hundred emigrant ships had crossed the Atlantic, and twenty thousand Englishmen had found a refuge in the West."[1] Thus it was that a large portion of the stern and sturdy men who crossed the Atlantic to find homes in the wilderness were driven here by a brutal intrusion of state power

Flight of the founders from state power.

[1] Green, *History of the English People*, iii, 170–171.

into that circle of individual rights surrounding the citizen which should be free from such intrusion. The dread of state power thus born was nurtured as time went on by the teachings of a new school of political philosophers that immediately preceded the French Revolution, which drew its *raison d'être* from the cruelly oppressive intrusion into the life of every individual of a state power so systematized as to be omnipresent. During the midnight period of monarchy that prevailed from the sixteenth century down to the French Revolution, the legal rights of the individual were so narrowed and fettered by the paternal power of the state in France, with its *banalités* and *seigneurs justiciers*, that "the prying eye of the Government followed the butcher to the shambles and the baker to the oven." There "the peasant could not cross the river without paying to some nobleman a toll, nor take the produce which he raised to market until he had bought leave to do so, nor consume what remained of his grain till he had sent it to the lord's mill to be ground, nor full his cloths on his own works, nor sharpen his tools at his grindstone, nor make oil or cider at his own press." [1] Out of the explosion caused by that terrible system of oppression came what may be called the orgy of individualism, immortalized by the broad generalizations of the French philosophers as to the inherent and inalienable rights of man. The French Constitution of 1793 declared that government is instituted to secure to man the free use of his natural and inalienable rights to equality, liberty, security, property. Such paper constitutions, invented by the French as a means of drawing a wide circle around the "rights of man" into which the state cannot intrude, were rendered vastly more effective by the American invention, whereby the judicial power, as an avenging angel with a drawn sword, can strike down all acts of the state forbidden, expressly or impliedly, by their terms. To those who witnessed the political earthquake whose centre was in France, the state appeared to be a monster as dangerous as that of Frankenstein, — a monster whose hands were to be tied by written constitutions defining what the citizen regarded as his inalienable rights.

Intrusion of state power in France.

The orgy of individualism.

The state a monster to be fettered with paper constitutions.

"Jefferson had returned from France in 1789 wholly en-

[1] See the great argument of the Hon. John A. Campbell in the Slaughter-House Cases, 16 Wall. 36.

grossed by the opening scenes of the French Revolution, and personally triumphant in the prospect of the coming success of the principles which he had formulated in the Declaration of Independence. Very soon after his return he seems to have become fixed in the belief that the conflict between government *by* the people and government *of* the people was to be transferred to America also, and that the Hamilton School, under the guise of broad construction, was aiming at monarchy."[1]

Creed of Jefferson's party.

As the Republican party of Jefferson matured its creed, it taught the mass of the population — largely "agricultural, democratic, particularist, devoted to the worship of their separate commonwealths, and disposed to look upon the Central or Federal Government very much as they had but recently looked upon the King" — that the one thing to be dreaded and guarded against was state power in any form it might assume. Out of such teachings came one of the most ennobling and strengthening influences that has ever entered into our national life. Just after we had begun to realize that we were Americans and no longer merely English colonists, we were thus taught that the law swept around each citizen a wide circle of individual rights into which no government, state or federal, could intrude except at its peril. The sturdy individualism that emerged from such a system became the substructure of a national character that received its first impress from the isolated conditions of life in which it was born. The profound modifications that have since occurred are the outcome of the intercommunication that has drawn us nearer to each other and to the outer world. In 1844 — just after that force had manifested itself in the establishment of lines of swift ocean steamers to Europe and in the extension of railways into the West — Emerson said: "We in the Atlantic States, by position, have been commercial, and have imbibed easily an European culture. Luckily for us, now that steam has narrowed the Atlantic to a strait, the nervous, rocky West is intruding a new and continental element into the national mind, and we shall yet have an American genius. . . . We cannot look on the freedom of this country, in connection with its youth, without a presentiment that here shall laws and institutions exist on some

Individualism substructure of national character.

Words of Emerson, 1844.

[1] Johnston, *American Political History*, 1763–1876, part i, pp. 203, 207. (Woodburn ed.).

scale of proportion to the majesty of Nature. To men legislating for the area between the two oceans, betwixt the snows and the tropics, somewhat of the gravity of Nature will infuse itself into the code."[1] There is nothing in that brilliant paragraph to indicate that Emerson foresaw that the mighty forces of intercommunication to which he refers, and which had begun already to draw the West closer to the East, and both to the great European world beyond, were soon to bring about a transition from the individualism, born of the freedom and isolation of our youth, to a collectivism through which primitive conditions have been entirely transformed.

State power now hailed as a deliverer.

Even a casual observer of existing conditions in our national life cannot fail to perceive that we are in the midst of an age of collectivism in which the functions of government, state and federal, multiply as the powers of the state are invoked for the protection of the individual against the vast corporate combinations arrayed against him. State power, no longer dreaded as a monster, is now hailed as the only deliverer strong enough to secure to the isolated individual that equality of opportunity supposed to be guaranteed to him by the Constitution and the laws. The practical result of the change is that as the functions of the state multiply, the circle of individual rights that once surrounded the individual as a barrier against state intrusion has been seriously narrowed at the invitation of the individual himself. A profound jurist and philosopher who has lately undertaken to deal with the results of this revolution, which has changed and is changing the entire aspect of American society, says: "It is no longer the preservation of a strong and independent individualism that is the object of solicitude. It is the creation of a state of dependence of the individual for his safety on the state. . . . Here, as fully as in Europe, in the view of the optimist at least, orderly coöperation is the rule of social life which modern legislation is seeking to enforce. It has not waited for a change in our constitutions. It is content to reinterpret them."[2] Therein we are reminded that the manufacturer, who finds his field of activity contracting,

Dependence of the individual on the state.

[1] "The Young American," lecture before the Mercantile Library Association, Boston, February 7, 1844. *Works*, i, 369–370.

[2] Judge Simeon E. Baldwin, *The Narrowing Circle of Individual Rights*, heretofore quoted, p. 5. See also pp. 7–8.

Illustrations.

cannot distill or brew in one state and cannot make a cigarette [1] in another; that the employer, who could once discharge those who did not vote for his candidate, is now punished by the state if he dares to do so; that the public official, who was once free to take an active part in politics, is subject to removal for such activity; that a man's house, once subject to seizure, after just compensation, for the purposes of government, may now be appropriated for a band-stand, a memorial site, a hospital, a college, a free library; [2] that a farmer, who once could plant and till his land as he would, is now liable to have it invaded by an official who may uproot the trees in his orchard and leave him without remedy if the state deems such action necessary for the public welfare; [3] that the owner of a wood lot, who was formerly free to cut it when he pleased and as he pleased, may now be ordered by the legislature to refrain from cutting the whole or a part of the natural growth for a period of years, whenever such a course is deemed to be for the greatest good of the greatest number; [4] that the owner of land from which comes oil or natural gas or artesian water may be compelled, on the one hand, to guard against waste, and on the other to refrain from increasing the natural flow to the prejudice of his neighbors; [5] that the riparian proprietor on streams not navigable may be compelled in many states to submit to the flooding of his lands by others, to create water power for them to put to milling or manufacturing purposes, while his fishing rights may be curtailed or perhaps denied for years, in order to replenish the stream with more fish for others to catch and eat; [6] that a grazier or butcher, who could formerly use his meat products as he saw fit, may now be punished as a criminal should he use his tallow to make a cheap substitute for butter; [7] that the man who could once educate his children as he pleased, or not at all, may

[1] Iowa Code, sec. 5006; Act of Feb. 28, 1905, of Indiana; State *v.* Lowry, 166 Ind. 372, 77 Northeastern, 728.

[2] United States *v.* Gettysburg Railway Co., 160 U. S. 668.

[3] State *v.* Main, 69 Conn. 23, 36, 37, 26 L. R. A. 673.

[4] Opinion of the Justices,—Maine, —69 Atlantic, 626.

[5] Ohio Oil Co. *v.* Indiana, 177 U. S. 190; Manufacturers' Gas Co. *v.* Indiana Gas Co., 155 Ind. 467. Similar statutes have been upheld in reference to the use of water from artesian wells. *Ex parte* Elam, 152 Cal., 91 Pac. 811.

[6] Freund on the Police Power, sec. 419.

[7] Powell *v.* Pennsylvania, 127 U. S. 678.

now be compelled by the state to educate them in a certain way; in obedience to the state's command he sends them to a public school, where it may refuse to receive them unless they are submitted to vaccination, although he may regard it as unnecessary and dangerous;[1] that the man who could once contemplate marriage, with his free choice untrammeled by considerations of personal health, may now be forbidden by the state, under heavy penalties, from marrying an epileptic or one of feeble mind;[2] that the man who could once dispose of his estate by will, with few limitations, provided he was not grossly unfair to his next of kin, must now submit when the state demands a share for itself, and one that is to be increased progressively with the magnitude of the inheritance.

Field of corporate action narrowed.

"The artificial person has lost more even than the natural person. Its field of action is continually being circumscribed; its manner of action continually subjected to new limitations. . . . The individual laborer has also been often treated by our legislators like a ward incapable of protecting his own interests. The number of hours for which he can agree to work in a day have been cut down, and his liberty of contract in many other directions circumscribed.[3] On the other hand, the power of the state has often been exerted to depress that of organized labor. It has regulated and, under some circumstances, forbidden strikes. It has forbidden boycotts. It has forbidden (though it know it not) combinations of labor in different states in restraint of commerce between those states. But there is no time to multiply references to a kind of legislation with which every man before me is familiar, and in shaping which many of whom have had a part. It is the age of collectivism. The functions of the state multiply. Its circle of activities expands, and the circle of activities around each private individual is correspondingly reduced."[4] When we see how such profound organic changes have been wrought through the silent operation of forces that sweep swiftly on

Organized labor.

The age of collectivism.

[1] Morris *v.* Columbus, 102 Ga. 792, 42 L. A. R. 175. As by the Kentucky Act of March 22, 1904.

[2] 2 Howard on Matrimonial Institutions, 400, 477, 480; Gould *v.* Gould, 78 Conn. 242, 61 Atlantic, 604.

[3] See N. Y. Labor Law of 1906; People *v.* Williams Engineering Co., 85 Northeastern, 1070; William Adair *v.* United States, October Term, 1907.

[4] *The Narrowing Circle of Individual Rights*, 8–9.

regardless of our cumbrous and impracticable plan of constitutional amendment, it is hard to read, without a smile, the following misguided observations: "An appetite for organic change is one of the worst diseases that can affect a nation. All real progress, all sound national development, must grow out of a stable, persistent, national character, deeply influenced by custom and precedent and old traditional reverence, habitually aiming at the removal of practical evils and the attainment of practical advantages, rather than speculative change. Institutions, like trees, can never attain their maturity or produce their proper fruits if their roots are perpetually tampered with. In no single point is the American Constitution more incontestably superior to our own than in the provisions by which it has so effectually barred the path of organic change that the appetite for such change has almost passed away."[1] No careful student of the American Constitution, who knows anything of its history or of its practical workings, could possibly have been deceived by the fancy that organic change has been barred by our peculiar system of amendment, or that "the appetite for such change" has been lost by a nation which, within a century, has passed through more organic changes than any other in history in the same length of time. If our Constitution really suffered from the lack of growing power Mr. Lecky has falsely attributed to it, it would have gone to wreck long ago; in a process of rapid transition it has been able to survive only through its marvelous elasticity. The growing and expanding power of the American Constitution has proved itself to be quite equal to that of the English. If it has not an omnipotent Parliament whose enactments can, at critical moments, cut it away from the past, it has its own unique creation, the omnipotent Supreme Court, which is always at work preparing the way for change by gradually readjusting organic relations.

Lecky's misapprehension.

Growing power of American Constitution.

In explaining the causes that have brought about the transition from individualism to collectivism, from a state of things in which the individual lived practically free from the intrusion of state power to a new condition in which the multiplying functions of the state are narrowing the circle of individual rights, — Judge Baldwin has attempted to reduce them to

Causes of transition from individualism to collectivism.

[1] *Democracy and Liberty*, i, 153, 154.

two. "The first of these," he says, "was the Civil War; the second was the Philosophy of Evolution. The Civil War had shown what men massed together in compact organization could do; and how little, in comparison, could be effected by individual exertion. It had shown how in every state a political majority could be scattered, suppressed, annihilated. It had shown that munitions and supplies such as armies demanded could only be furnished by great combinations of capital and labor. . . . As the Civil War was drawing near, Darwin and Wallace brought before the world the philosophy of evolution. It put the Creator of man in a new light."[1] Complete and exact as is the picture drawn by this large thinker of the results so far brought about by the transition now going on in this country from individualism to collectivism, it is impossible to accept as adequate the causes to which he traces the event. As the real causes are neither local nor accidental, they must be discovered beneath a vast world-movement that now embraces America as well as Europe. Their beginnings must be found in the development of the great industrialism which, after a long period of preparatory growth, began to reach its culminating point with the inventions and technical improvements, with the application of steam and the rise of the factory system in England, towards the close of the eighteenth century. Through the results of that industrial revolution, which now envelops the civilized world, large aggregations of capital have so applied the pressure of the competition of the large industry as to crush out the small capitalist, and to organize the working producers as an army of drilled wage-laborers in vast factories and workshops. Mr. Bryce, with unerring insight, clearly perceived the effects of the collectivism that has arisen out of that world-wide industrial revolution upon the individualism of this country, at a time when those effects were not so apparent as they are to-day. Twenty-two years ago he wrote: "The hundred years which have passed since the birth of the Republic have, however, brought many changes with them. Individualism is no longer threatened by arbitrary kings, and the ramparts erected to protect it from their attacks are useless and grass-grown. If any assaults are to be feared, they will come from another quarter. New causes are at work in the world

A world-movement embracing Europe and America.

Mr. Bryce's view in 1888.

[1] *The Narrowing Circle of Individual Rights*, 2–3.

tending not only to lengthen the arms of government, but to make its touch quicker and firmer. Do these causes operate in America as well as Europe? and if so, does America, in virtue of her stronger historical attachment to individualism, oppose a more effective resistance to them? I will mention a few among them. Modern civilization, in becoming more complex and refined, has become more exacting. It discerns more benefits which the organized power of government can secure, and grows more anxious to attain them. Men live fast, and are impatient of the slow working of natural laws. The triumphs of physical science have enlarged their desires for comfort, and shown them how many things may be accomplished by the application of collective skill and large funds which are beyond the reach of individual effort. . . . Unlimited competition seems to press too hardly on the weak. The power of groups of men organized by incorporation as joint-stock companies, or of small knots of rich men acting in combination, has developed with unexpected strength in unexpected ways, overshadowing individuals and even communities, and showing that the very freedom of association which men sought to secure by law when they were threatened by the violence of potentates may, under the shelter of the law, ripen into a new form of tyranny. And in some countries, of which Britain may be taken as the type, the transference of political power from the few to the many has made them less jealous of governmental authority. The government is now their creature, their instrument — why should they fear to use it? They may strip it to-morrow of the power with which they have clothed it to-day. . . . The new democracies of America are just as eager for state interference as the democracy of Britain, and try their experiments with even more light-hearted promptitude. No one need be surprised at this when he reflects that the causes which have been mentioned as telling on Europe, tell on the United States with no less force. Men are even more eager than in Europe to hasten on to the ends they desire, even more impatient of the delays which a reliance on natural forces involves, even more sensitive to the wretchedness of their fellows, and to the mischiefs which vice and ignorance breed."[1] Then, after declaring that "the Americans have no theory of the state and

Triumphs of physical science.

Unlimited competition too strong for the weak.

Democracies of America eager for state interference.

Americans charged with having no theory of the state.

[1] *The American Commonwealth* (3d ed.), ii, 539–542.

take a narrow view of its functions," [1] Mr. Bryce proceeds to say that "they have grown no less accustomed than the English to carry the action of government into ever-widening fields. Economic theory did not stop them, for practical men are proud of getting on without theory. The sentiment of individualism did not stop them, because state intervention has usually taken the form of helping or protecting the greater number, while restraining the few." [2]

A swelling volume of legislation.

And here the fact should be emphasized that this world-tendency to lengthen the arms of government and to extend them into ever-widening fields has of late years so swelled the volume of legislation that the output has been incomparably greater, not only absolutely, but in proportion to the population of the civilized nations, than in any previous age. This country is certainly contributing its full quota to the general result. The growth of legislative business in Congress appears upon the face of the following table, which sets forth by decades the total number of bills introduced into the two Houses from the First Congress up to and including the Sixty-first:—

BILLS INTRODUCED [3]

| *Congress* | *House* | *Senate* | *Total* |
|---|---|---|---|
| First | 143 | 46 | 189 |
| Tenth | 173 | 54 | 227 |
| Twentieth | 462 | 99 | 561 |
| Thirtieth | 814 | 485 | 1299 |
| Fortieth | 1460 | 648 | 2108 |
| Fiftieth | 12,664 | 4000 | 16,664 |
| Sixty-first | 33,015 | 10,906 | 43,921 |

Subjection of corporate power to state control.

For many years the effort to lengthen the arms of state supervision has been stimulated in this country by the imperious necessity for curbing the power of groups of men organized by

[1] In refuting that charge from another quarter, Judge Baldwin has well said: "A recent English writer [H. G. Wells, *The Future in America*, 153] has asserted that one great fault of the typical American of today is that he has no sense of the state; no perception that his own personal employment and activities are constituents in a large collective process, which affects other people and indeed the world forever. Such an impression as this the passing tourist, who picks up the wrong book and asks the wrong man for information, might not unnaturally get. But it belongs to a long past state of things." *The Narrowing Circle of Individual Rights*, 5.

[2] *The American Commonwealth* (3d ed.), ii, 539–542.

[3] See the author's article on *The Speaker and his Powers* in the *North American Review* for October, 1888.

incorporation as joint-stock companies, or of small groups of rich men acting in combination, with such unexpected strength and in such unexpected ways as to overshadow individuals and even communities, thus demonstrating that "the very freedom of association which men sought to secure by law when they were threatened by the violence of potentates may, under the shelter of the law, ripen into a new form of tyranny." The greatest obstacle in the way of subjecting corporate power in this country to supervisory state control has arisen out of the famous judgment delivered in 1819 in the Dartmouth College case,[1] in which the actual controversy turned upon the question whether the charter of the college was a grant of political power which the state could revoke or modify at pleasure, or a contract for the security and disposition of property bestowed in trust for charitable purposes. It was held that the act of government, whether it be an act of the Crown or of the Legislature, which creates a corporation, is a contract between the state and the corporation, and that all the franchises, powers, and benefits conferred by the charter become, when accepted by the corporation, contracts within the constitutional clause. "This is plainly a contract," said Marshall, C. J., "to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate have been conveyed to the corporation. It is then a contract within the letter of the Constitution and within its spirit also."

Dartmouth College case, 1819.

A charter a contract.

The first important modification was made in the case of The Charles River Bridge *v.* The Warren Bridge[2] (1837), in which it was held that the courts will insist upon the existence of an express contract by the state with a corporation, when relief is sought against subsequent legislation, in order to guard against the evils flowing from too sweeping an abdication of sovereign powers by implication. Despite Chief Justice Waite's assertion in Stone *v.* Mississippi[3] (1880), that the doctrines announced in the Dartmouth College case "have become so imbedded in the jurisprudence of the United States as to make

An important modification.

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518.

[2] 11 Peters, 420.

[3] 101 U. S. 814.

them, to all intents and purposes, a part of the Constitution itself," the fact remains that in that very case the Court held that no legislature can curtail the rights of its successors to make such laws as they may deem proper in matters involving the police power, which extends to all subjects affecting the public health or the public morals. In the words of the Court, "the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power, but they cannot give away or sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.' . . . The contracts which the Constitution protects are those that relate to property rights, *not governmental.*" Thus the protection of the contract clause of the Constitution was withdrawn from that large class of contracts falling within the domain of the police power, whose limits are continually widening as the judicial mind perceives the necessity for such an extension. In Holden *v.* Hardy,[1] the extent of the police power was ably defined by Mr. Justice Brown, who, after saying that "this power, legitimately exercised, can neither be limited by contract nor bartered away by legislation," held that a state statute limiting the period of employment of workingmen in underground mines, or in the smelting, or reduction or refining of ores or metals, to eight hours per day and making its violation a misdemeanor, is a valid exercise of the power of the state.

Police power excepted.

"Property rights, not governmental."

Holden *v.* Hardy.

Walter Bagehot has said that "a constitution is a collection of political means for political ends, and if you admit that any part of a constitution does no business, or that a simpler machine would do equally well what it does, you admit that this part of the constitution, however dignified or awful it may be, is nevertheless in truth useless." [2] While it cannot be said that any part of our Federal Constitution "does no business," it can be affirmed that there are three of its organs that are now

Three overworked parts of the Constitution.

[1] 169 U. S. 366.

[2] *The English Constitution*, 4–5.

doing so much more than any others that each stands forth as a distinct force incased in a distinct and growing literature of its own. Around the first section of the Fourteenth Amendment, by which the centre of gravity of the Constitution was shifted, the judges and text-writers have built up a body of learning whose essence has been briefly summarized already.[1] Around the contract clause, which provides that no state shall pass any "*ex post facto* law, or law impairing the obligation of contracts," an older literature has grown up whose beginnings are to be found in the Dartmouth College case. Around the third and last force, known as the commerce clause, which vests in Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," a literature is developing, next to be considered, whose beginnings are to be found in the famous case of Gibbons *v.* Ogden,[2] in which the power of Congress to regulate commerce was first defined. It is no exaggeration to say that the three streams of judge-made law which have been for a long time flowing from the Supreme Court into our national life through the channels just described have been and are the unifying and systematizing forces which have made a real national unity possible. Through their reciprocal action has been realized Marshall's dream: "That the United States form, for many and for most important purposes, a single nation has not yet been denied. In war we are one people. In making peace we are one people. In all commercial relations we are one and the same people. In many other respects the American people are one. And the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These states are constituent parts

Section 1, Fourteenth Amendment.

Contract clause.

Commerce clause.

Marshall's dream in Cohens *v.* Virginia.

[1] See above, p. 348 *sq.*

[2] 9 Wheaton, 1.

of the United States. They are members of one great empire, — for some purposes sovereign, for some purposes subordinate." [1]

Evolution of the commerce clause.

At the proper place emphasis was given to the fact that the meeting of the Federal Convention of 1787 was the outcome of the meeting in the year before of the Commercial Convention at Annapolis, called "to take into consideration the trade of the United States; to examine the relative situation of the trade of said states; to consider how far a uniform system in their commercial regulations may be necessary to their common interests and their permanent harmony." [2] The two overshadowing motives that brought about the making of the existing Constitution are to be found in the effort to create a federal assembly (1) with the independent power to tax; (2) with the power to regulate trade, foreign and domestic. How perfectly Charles Pinckney appreciated that fact is manifest from his draft, which provides: "Article VI. The Legislature of the United States shall have power to lay and collect taxes, duties, imposts, and excises; to regulate commerce with all nations, and among the several states." In the draft made for use in the Committee of Detail, Randolph wrote among the legislative powers, "2. to regulate commerce," and to that Rutledge added the words, "both foreign and domestick," and later added, as a marginal memorandum, the words, "Indian affairs." The committee reported the subject in the following language: "to regulate commerce with foreign nations, and among the several states," which was approved by the Convention on August 16, without discussion. When on August 29, Charles Pinckney moved to provide that "no act of the legislature for the purpose of regulating the commerce of the United States with foreign powers, or among the several states," should be passed without the assent of two thirds [3] of each House, the proposal was defeated. The additional words, "and with the Indian tribes," were not added until September 4, on motion of the Committee on Unfinished Portions. When during the discussion on the 15th, of the prohibition on the states from laying imposts, tonnage, etc., without the consent of Congress, Gouverneur Morris expressed

Pinckney draft.

Action of Convention, August 16.

Additional words, Sept. 4.

[1] Cohens *v.* Virginia, 6 Wheaton, 264.

[2] See above, p. 165 *sq.*

[3] For Pinckney's speeches, see Moore's *American Eloquence*, i, 366, 367.

the opinion that the states were not restrained by the Constitution from laying tonnage duties, Madison said that depended on the extent of the power to regulate commerce, which is a "vague term, but seems to exclude this power of the states."[1]

Gibbons *v.* Ogden, 1824.

When in 1824 the time came for the Supreme Court to construe the commerce clause in the famous case of Gibbons *v.* Ogden,[2] it appeared that Chancellor Kent had granted an injunction, sustained by New York's highest appellate court, restraining Gibbons from navigating the Hudson River by steamboats only licensed for the coasting trade under an Act of Congress, on the ground that he was thereby infringing the exclusive right granted by the State of New York to Robert Fulton and Livingston, and by them assigned to Ogden, to navigate all the waters of the state with vessels moved by steam. Thus it came to pass that on the very threshold of this great subject federal power, as the representative of individualism, met the potent outcome of the new industrialism which, with its inventions and technical improvements advanced by the application of steam, began to reach its culminating point toward the close of the eighteenth century. The claim in favor of monopoly, backed by state power, went down before a judgment holding that Congress had exclusive authority to regulate commerce in all its forms, on all the navigable waters of the United States, including bays, rivers, and harbors, free from monopoly, restraint, or interference by state legislation; that the term commerce meant, not only traffic, but intercourse; that it included navigation; therefore the power to regulate commerce included the power to regulate navigation. It was admitted that it did not include commerce purely internal; and the point was left undecided whether the power of Congress to regulate commerce was exclusive only when exercised, or whether a state might exercise it in the absence of action by Congress. Thus was established "that freedom of commerce between the states," which,

Monopoly backed by state power yields to federal power.

[1] Cf. Meigs, *The Growth of the Constitution*, 135–138.

[2] 9 Wheaton, 1. Wirt wrote to a friend: "To-morrow week will come on the great steamboat question from New York. Emmett and Oakley on one side, Webster and myself on the other. Come down and hear it. Emmett's whole soul is in the case, and he will stretch all his powers. Oakley is said to be one of the first logicians of the age; as much a Phocion as Emmett is a Themistocles, and Webster is as ambitious as Cæsar. He will not be outdone by any man if it is within the compass of his power to avoid it." Kennedy's *Life of Wirt*, ii, 142.

in the words of Mr. Justice Brewer, "perhaps more than any one thing, has wrought into the minds of the people the great thought of a single controlling nationality."

When in 1827 arose the case of Brown *v.* Maryland,[1] involving the regulation of foreign commerce, and the power of a state to interfere with it through taxation, it was held "that when the importer has so acted upon a thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." In 1847 arose the License cases,[2] in the first two of which the construction of the commerce clause was involved with the question whether, in the presence of an Act of Congress authorizing the importation from foreign countries of wines and spirits, a state might assume to prohibit or regulate their sale at retail; and in the last with the question whether, in the absence of an Act of Congress to regulate such importation, a state might prohibit by law the sale of liquor imported from another state. All of the state laws under review were held to be constitutional because not in conflict with any Act of Congress. In the first two cases Chief Justice Taney contended that the state laws were so framed as to act upon the article after it had passed the line of foreign commerce in the hands of the dealer. In the last, a diversity of opinion arose as to the question whether, in the absence of an Act of Congress regulating commerce between the states, all state laws on the subject were null and void. In other words, whether the mere grant of power to Congress could be construed as an absolute prohibition of the exercise of any power over the same subject by the states. In the opinion of the Chief Justice, despite such a grant, "the state may, nevertheless, for the safety and convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid, unless they come in conflict with the laws of

Brown *v.* Maryland, 1827.

License cases, 1847.

Opinion of Chief Justice Taney.

[1] 12 Wheaton, 419.

[2] Thurlow *v.* Massachusetts, Fletcher *v.* Rhode Island, Peirce *v.* New Hampshire, 5 Howard, 504.

Congress." The decision in Peirce *v.* New Hampshire was, however, distinctly overruled in Leisy *v.* Hardin,[1] known as the Original Package case, in which it was held that, as the grant of power to regulate commerce among the states is exclusive, "the states cannot exercise that power without the assent of Congress; and, in the absence of legislation, it is left to the courts to determine when state action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce." In Smith *v.* Turner and Norris *v.* Boston, known as the Passenger cases [2] (1849), the construction of the commerce clause of the Constitution was again involved. The precise question presented was whether that clause was violated by a law of the State of New York imposing a tax upon the masters of vessels arriving from a foreign port, for each steerage passenger and each cabin passenger, and upon the masters of coasting vessels for each passenger. The Court was thus again called upon to determine whether the power to regulate commerce was vested exclusively in Congress; and if so, whether a tax upon persons was a regulation of commerce. The result was that five judges, opposed by four, declared the laws null and void, in opinions which disclosed a marked conflict of view even among the judges who united in the prevailing opinion. Such conflicts may now be considered as removed by more recent decisions, in which it has been held in substance that the regulation of foreign commerce is exclusively within the control of Congress, and that no state can attempt its regulation even though there be no Act of Congress in existence with which such a regulation would conflict.[3] In Cooley *v.* Port Wardens [4] a Pennsylvania statute regulating pilots and pilotage, and providing that a vessel neglecting or refusing to take a pilot should pay and forfeit certain sums to a society for the relief of pilots, was held not to be in conflict with the article of the Federal Constitution prohibiting states from imposing imposts and duties on imports, exports, and tonnage, because those subjects are dis-

Passenger cases, 1849.

Exclusive control by Congress.

Pilots and pilotage.

[1] 135 U. S. 100 (1889).

[2] 7 Howard, 283.

[3] Wabash, St. L. & P. R. Co. *v.* Illinois, 118 U. S. 557; Fargo *v.* Michigan, 121 U. S. 230; McCall *v.* California, 136 U. S. 110.

[4] 12 Howard, 300; Huus *v.* New York & P. R. SS. Co., 182 U. S. 393; Homer Ramsdell Transp. Co. *v.* La Compagnie Générale Transatlantique, 182 U. S. 414.

tinct from fees and charges for pilotage, and from the penalties by which commercial states enforce their pilotage laws. In 1877, the Supreme Court, in citing and still further developing the principles announced in Gibbons *v.* Ogden fifty-three years before, held in Pensacola Teleg. Co. *v.* Western Union Teleg. Co.[1] that a telegraph company bears the same relation to commerce as a carrier of goods, and that the powers of Congress are not confined to the instrumentalities of commerce known of or in use when the Constitution was adopted. "The powers of Congress," said the Court, "are not confined to the instrumentalities known or in use when the Constitution was adopted, but keep pace with the progress of the country." In 1887 Mr. Justice Bradley, in summing up the cases on that subject, said in Leloup *v.* Port of Mobile [2] that "no state has the right to lay a tax on interstate commerce in any form whatever by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress." As a final extension, perhaps, of the doctrine laid down in The Genesee Chief *v.* Fitzhugh (1851), it was held in The Robert W. Parsons [3] (1903), that the Erie Canal, which, though lying wholly within the State of New York, forms a part of a continuous highway for interstate and foreign commerce by connecting Lake Erie with the Hudson River, is a navigable water of the United States as contradistinguished from a navigable water of the state.

Control of telegraph companies.

Final extension of admiralty jurisdiction.

An attempt has now been made to outline the origin and growth of the mighty power vested in Congress to regulate commerce, foreign and domestic, down to its enactment of "An Act to Regulate Commerce," approved February 4, 1887, by which the Interstate Commerce Commission was created. When that act was passed the case of California *v.* Central Pacific R. Co.,[4] was pending, in which it was held that "the power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate

Interstate Commerce Commission, February 4, 1887.

[1] 96 U. S. 1.
[2] 127 U. S. 640.
[3] 191 U. S. 17.
[4] 127 U. S. 1.

commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts to commerce. This power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agency of the state as well as federal corporations." [1] Thus was finally settled the right of Congress to grant charters for the construction of railroads in any state without its consent, a right never asserted prior to the Act to facilitate commercial, postal, and military communication among the several states, approved June 15, 1866.[2] By that Act was greatly accelerated the process through which commerce, including transportation, has been revolutionized by the establishment and rapid growth of inland facilities of distribution and sharpness of competition between trade centres, incident to the annihilation of distance through the increased speed of trains, as well as by the greatly increased capacity of engines and cars. It was the establishment of the great railway systems of continuous lines, unknown in the first decades of railway construction, that forced Congress in 1887 to organize the regulating power which down to that time lay

Water transportation eclipsed by steam.

Right of Congress to grant charters to railroads.

[1] See *Pacific R. R. Removal Cases*, 115 U. S. 14–18.

[2] 14 Stat. 66. See *A Study of the Power of the Congress over Railroads*, by E. A. Mosely, Secretary of the Interstate Commerce Commission, March 23, 1907.

practically dormant. In Texas & P. R. Co. *v.* Interstate Commerce Commission,[1] it was held that the Commission created by the Act of 1887 is a body corporate, with legal capacity to be a party plaintiff or defendant in the federal courts; and that it may apply by petition to the judicial power for the enforcement of its orders. In defining its jurisdiction the Court said: "Having thus included in its scope the entire commerce of the United States, foreign and interstate, and subjected to its regulations all carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage, the Act proceeds to declare that 'all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.' The significance of this language, in thus extending the judgment of the tribunal established to enforce the provisions of the Act to the entire service to be performed by carriers, is obvious."

Jurisdiction of Interstate Commerce Commission.

Prior to the Act of 1887 railroad traffic was regulated by the rules of the common law applicable to common carriers.[2] In the first case in which the Act of 1887 was construed, the Court said that prior to its enactment "railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service. . . . The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to prohibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to

Prior regulation by common law.

Objects of Act of February 4, 1887, declared.

[1] 162 U. S. 197.

[2] Munn *v.* Illinois, 94 U. S. 113.

prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not to ignore the principle that one can sell at wholesale cheaper than at retail." [1]

Judicial review of rates fixed by legislature or commission.

In Reagan *v.* Farmers' Loan and Trust Co.,[2] it was held that although the formation of a tariff of charges for transportation by a common carrier is a legislative or ministerial rather than a judicial function, the Court may decide whether or not such rates are unjust and unreasonable and such as to work a practical destruction of rights of property, and if found so to be may restrain their operation; that the fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws; that a schedule of rates made by railroad commissioners being challenged as a whole, the Court must either condemn or sustain it as a whole and cannot rearrange it or prepare a new schedule. In that case the Court said in express terms: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

Right of Commission to prescribe rates;

After the Commission had undertaken for many years to prescribe rates for the future, under the terms of the original Act, its right to do so was questioned in Interstate Commerce Commission *v.* Cincinnati, N. O. & T. P. Ry. Co.,[3] in which case the Court held that the Commission had no such right. "It will be perceived," say the Court, "that in this case the Interstate Commerce Commission assumed the right to pre-

[1] Interstate Commerce Com. *v.* Baltimore & O. R. Co., 145 U. S. 263.

[2] 154 U. S. 362.

[3] 167 U. S. 479.

scribe rules which should control in the future, and their application to the Court was for a mandamus to compel the companies to comply with their decision; that is, to abide by their legislative determination as to the maximum rates to be observed in the future. Nowhere in the Interstate Commerce Commission Act do we find words similar to those in the statutes referred to. . . . The power, therefore, is not expressly given." It was therefore held that it will not be presumed that Congress has transferred to any administrative body the power to prescribe a tariff of rates for carriage by a common carrier, if that power has to be inferred from doubtful and uncertain language; that the incorporation into the Act of the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the Act, do not by implication carry to the Commission or invest it with power to exercise the legislative function of prescribing rates which shall control in the future. In a word, "it is one thing to inquire whether the rates which have been charged and collected are reasonable, — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future,— that is a legislative act."

has judicial but not legislative power.

Finally the Court declared that the important duties of the Commission in respect to railroad rates include the duty of inquiry as to the management of the business, with the right to compel complete and full information concerning it, and the duty of seeing that there is no violation of the long and short haul clause of the Act, or any prohibited discrimination, rebate, or other device to give undue preferences, and also that the publicity required by section 6 is observed. It is now firmly settled that the Federal Government has exclusive power to regulate interstate commerce, and that no state can make a valid regulation affecting interstate transportation of passengers and property. The freedom of such commerce from state control was definitely settled as to the taxing power of the state in the case of the State Freight Tax in 1873;[1] and later in 1887, in the case of Robbins *v.* Shelby County Taxing District,[2] was declared the freedom of interstate commerce with respect to the police power of the state to control the liquor

Freedom of interstate commerce from state control.

[1] 15 Wallace, 232.

[2] 120 U. S. 623.

traffic. In Covington, etc., Bridge Co. *v.* Kentucky[1] it was held that an interstate bridge was an instrument of interstate commerce whereon Congress alone possessed the power to enact a uniform schedule of charges; and the same principle was applied in holding invalid the dispensary laws of South Carolina regulating the sale of intoxicating liquors and prohibiting their importation.[2]

Intrastate commerce defined.

In Louisville, N. O. & T. R. Co. *v.* Mississippi,[3] the line between interstate and intrastate commerce was thus drawn: "It has often been held in this Court, that there can be no doubt about it, that there is a commerce wholly within the state, which is not subject to the constitutional provision, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this Court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other."[4] Reference is then made to Stone *v.* Farmers' Loan and Trust Co.,[5] in which it was held that a state has power to limit railroad charges for transportation within its own jurisdiction, unless restrained by contract, or the power of Congress to regulate foreign or interstate commerce; and that the power can only be bargained away, if at all, by words of positive grant, or their equivalent. It was said, however, that "this power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." In Munn *v.* Illinois, a statute of that state fixing the maximum of charges for the storage of grain in warehouses in Chicago and other places in the state was held to be valid, as a mere common-law regulation of trade or of business, not in violation of the limitations upon the legislative power of the state imposed by the Federal

State has no power to destroy.

Extent of its police power.

[1] 154 U. S. 204.

[2] Scott *v.* Donald, 165 U. S. 58; Vance *v.* Vandercook, 170 U. S. 439.

[3] 133 U. S. 587.

[4] The Daniel Ball, 10 Wall. 557; Hall *v.* De Cuir, 95 U. S. 485; W. U. Tel. Co. *v.* Texas, 105 U. S. 460.

[5] 116 U. S. 307.

Constitution. It was also held that citizens must so use their property as not to injure others; that the regulation of the price of the use of property is not necessarily a deprivation; that property, such as Chicago grain warehouses, affected with a public interest, is subject to public regulation; that the legislature is the judge of the reasonableness of the regulation of rates and charges; that it is the judge of the propriety of its interference; that the regulation of Chicago elevators is not a regulation of interstate commerce.[1] In the subsequent case of Chicago, etc., R. R. Co. *v.* Minnesota,[2] three of the justices dissented on the ground that the conclusions of the majority practically overruled the case of Munn *v.* Illinois. Mr. Justice Blatchford, who delivered the opinion of the Court, said: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." That dictum of the prevailing opinion in the Minnesota case pointed the way to further modifications in the rule which Munn *v.* Illinois had established. The proposition, that the reasonableness of rates established is a judicial question, has since been approved and has become the settled rule.[3]

Subsequent modifications.

In Chicago, B. & Q. R. Co. *v.* Iowa,[4] an Illinois statute establishing a reasonable maximum rate of charge for the transportation of passengers and freight on the different railroads of the state was held not to conflict either with the Federal Constitution or that of the state, as railroad companies engaged in a public employment affecting the public interest are subject to legislative control as to their rates of fare and freight, unless protected by their charters. An important statement of the relation between the police power of a state and the power of Congress to regulate interstate commerce is contained in Louisville & N. R. Co. *v.* Kentucky,[5] wherein it was held that the prohibition by a state of the consolidation of parallel and competing lines of railway is not interference with the power of

Police power of state and commerce power of Congress.

[1] 94 U. S. 113.
[2] 134 U. S. 461.
[3] Reagan *v.* Farmers' Loan & Trust Company, 154 U. S. 397; Interstate Commerce Com. *v.* Railway Co., 167 U. S. 500.
[4] 94 U. S. 155.
[5] 161 U. S. 677.

Congress over interstate commerce; that whatever is contrary to public policy, or inimical to the public interest, is subject to the police power of the state and within legislative control, in the exercise of which the legislature is vested with a large discretion, beyond the reach of judicial inquiry, if it is exercised bona fide for the protection of the public.

Separate accommodations on account of race.

In Plessy *v.* Ferguson[1] it was held that the Thirteenth Amendment, abolishing slavery and involuntary servitude, is not violated by a state statute requiring separate accommodations for white and colored persons on railroads; that a state statute providing for separate railway carriages for the white and colored races by railways carrying passengers in their coaches, in the state, and the assignment of passengers to coaches according to their race, does not deprive a colored person of any right under the Fourteenth Amendment.

Permissible state taxation and regulation.

The privilege tax imposed by Mississippi on sleeping and palace car companies carrying passengers from one point to another within the state cannot be deemed an unconstitutional regulation of commerce. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce.[2] A railroad corporation largely engaged in interstate commerce is amenable to state regulation and taxation as to any of its service which is wholly performed within the state, and not as a part of interstate service.[3] A state tax on the property within the state belonging to a foreign telegraph corporation, the value of which was determined by regarding it as part of a system operated in other states, is not invalid because such corporation is engaged in interstate business.[4]

State inspection laws.

In Patapsco Guano Co. *v.* North Carolina Board of Agriculture,[5] it was held that interstate as well as foreign commerce is subject to state inspection laws; that such laws are valid when they act on a subject before it becomes an article of commerce, and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self-protection commonly called the police

[1] 163 U. S. 537.
[2] Pullman Co. *v.* Adams, 189 U. S. 420.
[3] New York ex rel. Penn. R. Co. *v.* Knight, 192 U. S. 21.
[4] Western Union Telegraph Co. *v.* Missouri, 190 U. S. 412.
[5] 171 U. S. 343.

power. In Kimmish *v.* Ball,[1] it was held that the statute of Iowa, providing that any person who has in his possession in that state any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large, and thereby spreading the disease known as Texas Fever, is not in conflict with the paramount authority of Congress to regulate interstate commerce.

Pure food acts.

In Crossman *v.* Lurman,[2] it was held that the New York statute forbidding the sale of adulterated food and drugs is not repugnant to the commerce clause, but is a valid exercise of the police power of the state. Congress has not deprived the states of their police power to legislate for the prevention of the sale of articles of food so adulterated as to come within valid prohibitions of the statute.

Liquor traffic.

In Bartemeyer *v.* Iowa,[3] it was held that the right to sell intoxicating liquors is not one of the privileges and immunities of a citizen of the United States which, by the Fourteenth Amendment, a state is forbidden to abridge; and at a little later day it was held in Mugler *v.* Kansas[4] that a state law prohibiting the manufacture within its limits of intoxicating liquors, to be sold and bartered for general use as a beverage, was not necessarily an infraction of the Constitution, because the Fourteenth Amendment does not deprive a state of the police power to determine primarily what measures are needful for the protection of the public morals, health, and safety. It was held, however, in Bowman *v.* Chicago & Northwestern R. Co.[5] that a provision of the Code of Iowa forbidding any common carrier to bring within that state any intoxicating liquors from any other state or territory, without first having the certificate therein required, is a regulation of commerce among the states and is void, as repugnant to the Federal Constitution; such a statute is not an inspection law, nor a quarantine or sanitary law, and is not a legitimate exercise of police power by the state.

Justice Field runs the line.

Mr. Justice Field, in his concurring opinion, said: "That where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment

[1] 129 U. S. 217.
[2] 192 U. S. 189.
[3] 18 Wall. 129.
[4] 123 U. S. 623.
[5] 125 U. S. 465.

of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it, and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the state shall be unrestricted. It is only after the importation is completed, and the property is mingled with and becomes a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled." That separation of the two domains was approved, as "doctrine now firmly established," in Leisy *v.* Hardin,[1] in which it was held that a citizen of one state has the right to import beer into another state, and the right to sell it there in its original packages; that up to such sale the state has no power to interfere by seizure, or any other action, to prevent the importation and sale by a foreign or non-resident importer; that the right of transportation of an article of commerce from one state to another includes the right of the consignee to sell it in unbroken packages at the place where the transportation terminates; that only after the importation is completed and the property imported is mingled with and becomes a part of the general property of the state by a sale by the importer, can state regulations act upon it. That case was approved in American Steel Co. *v.* Speed,[2] in which it was held that a state is not precluded from imposing a merchants' tax upon a non-resident manufacturing corporation which stores property received from another state in a warehouse and subsequently sells the same. In the Act to Regulate Commerce as amended up to June 18, 1910, it is expressly

Exemption of original packages.

Amendment of June 18, 1910.

[1] 135 U. S. 100. [2] 192 U. S. 520.

provided "that the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid."

Three new subject-matters in Act of June 18, 1910.

Such is the essence of the outcome of twenty-three years of construction of the Interstate Commerce Act of 1887 at the hands of the Commission and the federal courts, all of which must be considered in connection with the amendments made by Congress during that tentative period, so numerous that a mere catalogue of their titles occupies two printed pages octavo. In the light of that experience Congress passed an Act, approved June 18, 1910, entitled, "An Act to create a Commerce Court, and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes." Since that enactment the Interstate Commerce Commission has published a brief compilation entitled, "The Act to Regulate Commerce (as amended), and acts supplementary thereto: Commerce Court Act; Safety Appliance Acts; Act requiring monthly report of accidents; Arbitration Act; Hours of Service Act; Revised to July 1, 1910." In that form we have a summary of the entire field of activity to which the work of the Commission has been so far extended. In the Act of June 18, 1910, there are three new subject-matters worthy of special consideration. By section 7 of that Act it is provided "that the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe-lines, or partly by pipe-lines and partly by railroad, or partly by pipe-lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States, to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be a common carrier within the meaning and purpose of this Act." By sec-

A summary of statutes.

Pipe-lines, telegraph, telephone, and cable companies common carriers.

Jurisdiction of Commerce Court.

tion 1 of the same Act "a court of the United States is hereby created which shall be known as the Commerce Court, and shall have the jurisdiction now possessed by Circuit Courts of the United States and the judges thereof over all cases of the following kinds: First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by the infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money. Second. Cases brought to enjoin, set aside, or suspend in whole or in part any order of the Interstate Commerce Commission. Third. Such cases as by Section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the states,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a Circuit Court of the United States. Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February four, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a Circuit Court of the United States. Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the Circuit Courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court. The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this Act shall not affect the jurisdiction now possessed by any Circuit or District Court of the United States over cases or proceedings of a kind not within the above enumerated classes." By section 16 it is provided "that the President is hereby authorized to appoint a commission to investigate questions pertaining to the issuance of stock and bonds by railroad corporations, subject to the provisions of the Act to regulate commerce, and the power of Congress to regulate or affect the same, and to fix the compensation of the members of such commission."

Investigation of railroad stocks and bonds.

Railroad capitalization.

As that Commission has been appointed, the Federal Government has taken the first step looking to its control of railway capitalization, a subject whose vastness will appear from the following statement: "The stocks of the roads of this country, exclusive of switching and terminal roads, outstanding in

1890, was in round numbers, $4,409,658,000, and in 1908, $7,373,212,000: in the former year $28,194 per mile of line, and in the latter year $33,238 per mile of line. Their funded debt outstanding in 1890 was $4,574,576,000, and in 1908, $9,394,332,000: per mile of line in the former year $29,249, and in the latter year $42,349. The interest that accrued in the year 1890 was $221,499,000, and in the year 1908, $368,295,000: the amount of interest that accrued in the former year per mile of line was $1,466,000 and in the latter year $1,660,000. Thus it will be seen that there has been a steady and rapid increase in the totals of stock and bond capitalization, due, of course, in large part, to additional mileage, and doubtless to some extent to permanent improvements, additional equipment, etc.; and that the annual interest accrued per mile of line in 1908 was nearly fifteen per cent in excess of that in 1890, and more than ten per cent in excess of the interest accrued in 1905."[1] Those who contend that federal control should be extended over the broad field of railroad finance say that companies with established characters and credit should not be permitted in times of prosperity to burden their properties with as much increased liability as the market will take, without due regard to the purposes to which the fruits of the additional loans shall be applied. The right to take away such a standing temptation to exploiters is based upon the assumption that the absolute and unconditional control over interstate commerce extends necessarily to all of the agencies incident to it. When it is actually asserted, it will no doubt be resisted as unconstitutional, on the ground that it violates the rights conferred by the state charters under which most of the carriers are operated. In order to create a class of corporations that will be unable to set up such a defense, a bill was introduced in the House of Representatives, on February 7, 1910, entitled "A Bill to provide for the formation of corporations to engage in interstate and international trade," each one of which is to be invested with a national franchise to produce or manufacture within any state any of the articles in which it proposes to trade, such franchises having been heretofore

Federal control of all agencies of interstate commerce.

Corporations to engage in interstate and international trade.

[1] These figures were taken from the address of the Hon. Judson C. Clements, a member of the Interstate Commerce Commission, delivered before the Economic Club of Boston, March 30, 1910.

granted only by the states. Whether Congress can confer them is certainly a serious question involving, in a very difficult and delicate form, the relations of the state and federal governments to each other. The purpose here is simply to state these pending problems, not to solve them. That there is a determined purpose to extend federal control over corporations to the greatest extent possible, regardless of the sources from which their charters are drawn, was manifested by the Federal Corporation Tax Law of 1909, which provides "that every corporation . . . organized under the laws of the United States, or of any state or territory of the United States, . . . shall be subject to pay annually a special tax with respect to the carrying on, or doing business by such corporation." The advocates of the validity of the tax rest its constitutionality mainly upon the proposition that it is an excise tax on business similar to that sustained in the case of Spreckles *v.* McClain,[1] while those who oppose it contend that the tax is certainly invalid because violative of the fundamental principle that neither state nor federal government may tax one of the instrumentalities or powers of the other, since such taxation, involving as it does the possibility of the destruction by one government of those functions reserved exclusively to the other, is violative of the federal principle itself.[2]

Federal control of corporations.

Excise tax on business.

The same general causes that compelled Congress to enact the Interstate Commerce Act of 1887, compelled it to enact the Sherman Anti-Trust Act of July 2, 1890, which contains these two distinct prohibitions: —

Federal Anti-Trust Act of July 2, 1890.

SECTION 1. Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, will be guilty of a misdemeanor.

As early as 1870 some of the states attempted to prevent extortion through combinations to suppress competition by means of constitutional prohibitions directed principally against

Prior anti-trust state statutes.

[1] 192 U. S. 397.

[2] McCulloch *v.* Maryland, 4 Wheat. 316. A judgment has just been rendered sustaining the constitutionality of the Act.

discrimination in fares and freights, while in a few states the consolidation of parallel and competing lines of railway, was forbidden.[1] The movements thus begun in the states against railroad pools and discrimination in rates for transportation have since crystallized into systems of statute law directed against restraints of trade generally. The warfare now being carried on by the joint forces of the state and federal governments against monopolies and combinations in restraint of trade is almost as old as civilization itself. As early as A. D. 483 we find the Emperor Zeno issuing to the Pretorian Prefect of Constantinople an edict opening with this declaration: "We command that no one may presume to exercise a monopoly of any kind of cloth, or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be, either of his own authority, or under a rescript of an emperor already procured, or that may hereafter be procured, . . . nor may any persons combine or agree, in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they may have agreed among themselves."[2]

Zeno's edict against monopolies, A. D. 483.

In England we find from the Year-Books, as early as the second of Henry V (A. D. 1415), that the rule that contracts which are in restraint of trade are void, as against public policy, was then settled law. The kind of a "trust" described in Zeno's edict became the subject of legislation in England as early as the fifth and sixth of Edward VI, chapter 14, in "An Act against Regraters, Foretasters, and Ingrossers," the crime of regrating in Old-English law consisting "of buying or getting into one's hands at a fair or market any provisions, corn, or other dead victual, with the intention of selling the same again in the same fair or market, or in some other within four miles thereof, at a higher price."[3] That statute was repealed by 12 George III, chapter 71, because "it hath been found by experience that the restraints laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in said commodities, have a tendency to discourage the growth, and to enhance the price

Early English law as to contracts in restraint of trade.

[1] See Spelling on *Trusts and Monopolies*, 140.

[2] Code, iv, 59. The translation of this edict is by A. A. Marsh, Q. C., and first appeared in 8 *Canadian Law Times*, 299, 300. See also 23 *Am. L. Rev.* 261.

[3] Black, *Law Dictionary*.

Monopolies in time of Edward VI.

of the same." In the reign of Edward VI and his immediate successors it became possible to create monopolies not by a combination of individuals or companies, but by royal patents whereby the sovereign was accustomed to grant special privileges to his favorites, which constituted a practical monopoly. As defined by Lord Coke,[1] "A monopoly is an institution or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade." It was monopolies of that character which Elizabeth granted with such a lavish hand. "She granted her servants and courtiers," says Hume,[2] "patents for monopolies, and these patents they sold to others, who were thereby enabled to raise commodities to what price they pleased, and who put invincible restraints upon all commerce, industry, and emulation in the arts." When the legality of such patents was questioned, they were declared void in 1602, in the case of Darcy *v.* Allain.[3]

Monopolies of Elizabeth.

Anti-monopoly statute of 21 James I, c. 3,

The position thus taken by the Court was subsequently confirmed in 1623 by the statute of 21 James I, chapter 3, in which it was declared "that all monopolies and all commissions, grants, licenses, charters, and letters patent heretofore made or granted or hereafter to be made or granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of anything within this realm or the dominion of Wales," are altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing (then supposed to belong to the prerogative of the King), and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war. While that anti-

became basic in this country.

monopoly statute of James I became basic[4] in the jurisprudence of the United States, as one of those applicable to the condition of each state in which it was accepted as a part of the common

[1] 3 Inst. 181. Beach, *Monopolies and Industrial Trusts*, 4–36.

[2] *History of England* (Harper's ed.), 335–336.

[3] 11 Rep. 84 *b*.

[4] See the masterful exposition of Mr. Justice Field in his dissenting opinion in the *Slaughter-House Cases*, 16 Wall. 36.

law, the early English doctrine on the subject of monopolies was there seriously modified in favor of the same. "At a later period, as modern improvements in machinery and manufactures came into use, and under the influence of steam navigation and railway transportation, many of the statutes against monopolies were repealed, and the decisions of the courts became more tolerant of combinations of capital in business operations, corporations and joint-stock companies, conducting business on a large scale, came to be recognized as legitimate, and proper business methods. Courts of equity were somewhat reluctant to conform their decisions to the statutory and common-law changes, but the rules established at an earlier day were gradually modified in adaptation to modern industrial conditions. The leading case of the Mogul Steamship Company *v.* McGregor,[1] before the English Court of Appeals, is recognized as a turning-point in the decisions of the courts. It is much more tolerant of 'trusts' than the decisions of an earlier period."[2]

Its principles modified in England.

When the growth of great combinations of capital, arising out of steam navigation and railway transportation, and out of modern improvements in machinery and manufactures, cast upon American courts the duty of dealing anew, and upon a larger scale, with trusts and monopolies, instead of following recent English precedents in favor of "trusts," they deemed it wiser to advance by falling back upon the earlier and more stringent rules of the common law. The Federal Anti-Trust Act of 1890 and the anti-trust statutes of most of the states affix severe penalties to a violation of their terms, and in some instances an attempt to control the price of any commodity or to limit its production is made a criminal conspiracy. As now construed, the Federal Anti-Trust Act is supposed to indulge in a sweeping denunciation of "*every* contract, combination, in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce* among the several states, or with foreign nations." For seven years after its passage the idea, evidently entertained by its authors, seems to have prevailed that "this form of language merely described such contracts and combina-

American courts fall back on earlier English doctrine.

How Anti-Trust Act was understood by its authors.

[1] L. R. 23 Q. B. Div. 598; L. R. App. Cas. 25. See Taylor, *The Science of Jurisprudence*, 542–543.

[2] Beach, *Monopolies and Industrial Trusts*, 15–16.

tions as were made for the express purpose of preventing competition and thereby controlling prices and unduly enhancing profits."[1] A marked change took place, however, in the languid administration of the Act that had prevailed down to that time when in 1897, the Supreme Court, adopting a literal construction of the broad prohibition of the Act, declared, in United States *v.* Trans-Missouri Freight Association,[2] that "it may be that the policy evidenced by the passage of the Act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the Act ought to read as contended for by the defendants, Congress is the body to amend it and not this Court by a process of judicial legislation wholly unjustifiable."

Literal construction of 1897.

U. S. *v.* Knight Co., 1895.

During the Harrison Administration, in the early part of which the Act in question was passed, only seven proceedings were commenced under it, — four to dissolve combinations, in which only minor successes were won, and three criminal proceedings, all of which failed. To that unpromising beginning was added during the first Cleveland Administration the defeat in 1895 of the Government in United States *v.* E. C. Knight Co.,[3] in which it was held that Congress did not attempt by the Act of July 2, 1890, to assert the power to deal with monopoly as such; or to limit or restrict the rights of corporations or citizens in the acquisition, control, or disposition of property; or to regulate or prescribe the prices at which property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition or control of property which the states sanctioned or permitted; that an article is manufactured for export to another state does not make it an article of interstate commerce; the intent of the manufacturer does not determine when the article belongs to commerce; that trade or commerce might be indirectly affected is not enough. The primary purpose of the Act, "to protect trade and commerce against unlawful restraints and monopolies," was declared to be the preven-

[1] See Gilbert H. Montague's article entitled "The Defects of the Sherman Anti-Trust Law," *Yale Law Journal*, Dec., 1909, p. 1, citing Senator Edmunds, Speech in Senate, March 27, 1890; Senator Hoar, Speech in Senate, April 8, 1890.

[2] 166 U. S. 290, 340.

[3] 156 U. S. 1.

tion of combinations, contracts, and conspiracies to monopolize or restrain interstate or international trade and commerce.

In referring to that defeat, in his annual report for 1895, the Attorney-General said: "Combinations and monopolies, therefore, although they may unlawfully control production and prices of articles in general use, cannot be reached under this law merely because they are combinations and monopolies, nor because they may engage in interstate commerce as one of the incidents of their business"; and, in his report of the next year, he added that "the restricted scope of the provisions of this law as they had been construed by the courts, especially in the case of United States *v.* E. C. Knight Co. (156 U. S. 1), makes amendment necessary if any effective action is expected from this department." [1] Until that time the Act had been employed effectively only in the dissolution of oppressive trade agreements, and in the punishment of lawless combinations of laborers and railroad employees, charged with a combination and conspiracy to bring about unlawful and forcible interference with interstate commerce and the transportation of the mails. In denying the petition for habeas corpus, *Re* Debs,[2] the Court said: "We enter into no examination of the Act of July 2, 1890 (26 Stat. at Large, 209), upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the Act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion,[3] believing it of importance that the principles underlying it should be fully stated and affirmed."

Attorney-General's reports of 1895, 1896.

*Re* Debs, 1895.

Such were the conditions antecedent to the announcement, on March 22, 1897, of the judgment in United States *v.* Trans-Missouri Freight Association, in which it was bluntly declared that the judicial power would execute "the policy evidenced by the passage of the Act itself," regardless of any possible disaster that might result from the enforcement of that policy;

United States *v.* Trans-Missouri Freight Association, 1897.

[1] Annual Report of the Attorney-General of the United States, 1896.

[2] 158 U. S. 564 (1895).

[3] That broader ground was that "every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other."

that if amendments were necessary, Congress alone was competent to make them. The outcome of the alarm that followed that change in the policy of the Supreme Court was a rush to consolidation in every branch of industry. As the Act, strictly construed, put the stamp of nullity upon *every* contract, combination, or agreement, in the form of trust or otherwise, *in restraint of trade or commerce* among the several states, or with foreign nations, the corporations resolved to abandon contracts, associations, and loose combinations restraining trade in the slightest degree, for consolidation under single ownership in "holding corporations." Thus came into being gigantic "holding corporations," designed to concentrate under a single control power previously diffused among groups of concerns. As a specialist has recently stated it: "Before 1897 there existed scarcely sixty concerns that were dominant in their respective trades. During the next three years one hundred and eighty-three such corporations were organized — seventy-nine in the year 1899 alone — with a total capitalization of over four billions of dollars. These enormous combinations comprised one seventh of the manufacturing industry of the United States, one twentieth of the total wealth of the nation, nearly twice the amount of money in circulation in the country, and more than four times the capitalization of all the manufacturing consolidations that were organized between 1860 and 1893. In rapid succession various concerns in the steel business combined, until in 1901 the United States Steel Corporation was organized with a capitalization of one billion four hundred million dollars, for the purpose of acquiring the stock of ten of the largest corporations in the world. The consolidation among the railroads was still more remarkable. Ninety per cent of the total railroad mileage fell into the control of fifty-seven railroad systems, which together represented ninety-two per cent of the total capital stock and ninety-eight per cent of the total capitalization, including stock and bonds, of all the railroads in the country."[1] The McKinley Administration, which did practically nothing under the Act, surrendered to the new device known as the "holding corporation"; and in his report for 1899, the Attorney-General said: "In all instances the Department has

Single ownership in "holding corporations."

Surrender of McKinley Administration.

[1] G. H. Montague's article, 3, 4, citing G. H. Montague: *Trusts of To-day*, 23; Moody: *Manual of R. R. and Corporation Securities*, 1900–09.

been governed only by a sincere desire to enforce the law as it exists and to avoid subjecting the Government to useless expense and all officers of the Government to humiliating defeat by bringing actions where there was a clear want of jurisdiction under the well-defined limits of federal jurisdiction so clearly laid down by the Supreme Court in cases already decided."

Roosevelt and Knox.

President Roosevelt's Administration began September 14, 1901, and in 1903 occurred a panic which focused the eyes of the public upon the vast industrial combinations, the vicissitudes of whose securities in the market, and the effect of their operations upon their competitors, their consumers, and the public generally, discredited the idea that consolidation in the form of merger was a universal solvent. In February, 1903, five hundred thousand dollars were appropriated to be expended in prosecutions under the Sherman Anti-Trust Act and the Interstate Commerce Act[1] by Attorney-General Knox, who was at once willing and able to win. In that year proceedings were begun under the Act in question against the Northern Securities Company, a "holding corporation"; and in March, 1904, a judgment was rendered by the Supreme Court in which it was held that Congress did not exceed its power under the commerce clause of the Constitution in enacting the statute in question, declaring illegal every combination or conspiracy in restraint of interstate commerce, and forbidding attempts to monopolize such commerce or any part of it, although such statute is construed to embrace a combination of stockholders of two competing interstate railway companies to form a stockholding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies. In a word, the Court held that the Northern Securities Company was in violation of the Anti-Trust Act, and declared illegal all combinations in restraint of trade effected through the device of "holding corporations."

Northern Securities Co. decision, 1904.

Justice Brewer's important qualification.

While concurring in the result, Mr. Justice Brewer — who was with the majority of the Court in United States *v.* Trans-Missouri Freight Association and like cases that followed it — deemed it necessary to say that, still adhering to "the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments cannot be sus-

[1] Act of February 25, 1903.

tained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the Act. That Act, as appears from its title, was leveled only at 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. . . . Further, the general language of the Act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen." That final statement is the key to the analysis of the two vigorous dissenting opinions prepared by Mr. Justice White and Mr. Justice Holmes. The former rests upon the contention that Congress has no constitutional authority to curtail "the power which each individual has to manage his own property and determine the place and manner of its investment," to the extent indicated in the judgment of the Court. "True, the instrumentalities of interstate commerce," says Mr. Justice White, "are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. . . . All the rights of ownership in railroads belonging to corporations organized under the state law, the power to acquire the same, to mortgage, to foreclose mortgages, to lease and the contract relations concerning them, have, from the foundation, had their sanction in the legislation of the several states." The latter rests upon the contention that conceding the power of Congress, which Mr. Justice White denies, the Anti-Trust Act, "when properly interpreted, does not embrace the acquisition and ownership of such stock." "In

Justice White's dissent.

Justice Holmes's dissent.

view of my interpretation of the statute," says Mr. Justice Holmes, "I do not go further into the question of the power of Congress. That has been dealt with by my brother White, and I concur, in the main, with his views."

Combinations that do good distinguished from those that do evil.

So disquieting was the effect of the sweeping victory of the Government in the Northern Securities Company Case, which put outside of the law a vast number of industrial concerns of the first importance, that the Administration hastened to assure the business community that it would be used with justice and moderation; that only "bad" trusts would be singled out for prosecution. In his annual message in 1905 President Roosevelt said: "It is generally useless to try to prohibit all restraint on competition, whether this restraint be reasonable or unreasonable; and where it is not useless it is generally hurtful"; and in his annual message in 1906 he said, while discussing the working of the Anti-Trust Act: "The actual working of our laws has shown that the effort to prohibit all combinations, good, or bad, is noxious where it is not ineffective. Combination of capital, like combination of labor, is a necessary element in our present industrial system. It is not possible completely to prevent it; and if it were possible, such complete prevention would do damage to the body politic. . . . It is unfortunate that our present laws should forbid all combinations instead of sharply discriminating between those combinations which do good, and those combinations that do evil." In September of the year last named, Judge Taft, in a speech at Bath, Maine, in describing the Anti-Trust Act, said: "Construed literally, this statute could be used to punish combinations of the most useful character, like partnerships and other business arrangements conceded by all to be legitimate and proper; and the difficulty in its construction has been to draw a line effective to suppress the real evil aimed at by the legislature and to furnish a proper and clear rule for the guidance of business men while not interfering with legitimate combinations which Congress has no purpose to prevent." In opening his campaign at Columbus, Ohio, August 19, 1908, Judge Taft said: "I am inclined to the opinion that the time is near at hand for an amendment of the Anti-Trust Law, defining in great detail the evils against which it is aimed and making clearer the distinction between lawful agreements reason-

Danger of literal construction.

Amendment of Anti-Trust Act proposed.

ably restraining trade and those which are pernicious in their effect, and particularly denouncing the various devices for monopolizing trade which prosecutions and investigations have shown to be used in actual practice. The decisions of the courts and the experience of executive and prosecuting officers make the framing of such a statute possible."

Case of American Tobacco Co., 1908.

In the same year the Circuit Court of Appeals declared the American Tobacco Company and its allied concerns a combination in violation of the Anti-Trust Act, Judge Lacombe saying in his opinion,[1] after quoting the terms of section 1:—

That declaration, ambiguous when enacted, is, as the writer believes, no longer open to construction in inferior federal courts. Disregarding the various *dicta* and following the several propositions which have been approved by successive majorities of the Supreme Court, this language is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers, however small. As thus construed, the statute is revolutionary. By this it is not intended to imply that the construction is incorrect. When we remember the circumstances under which the Act was passed, the popular prejudice against large aggregations of capital, and the loud outcry against combinations which might in one way or another interfere to suppress or check the full, free, and wholly unrestrained competition which was assumed, rightly or wrongly, to be the very "life of trade," it would not be surprising to find that Congress had responded to what seemed to be the wish of a large part, if not all, of the community, and that it intended to secure such competition against the operation of the natural laws. The Act may be termed revolutionary, because before its passage the courts had recognized a "restraint of trade" which was held to be unfair, but permissible, although it operated in some measure to restrict competition. By insensible degrees, under the operation of many causes, business, manufacturing, and trading alike has more and more developed a tendency toward larger and larger aggregations of capital and more extensive combination of individual enterprise. It is contended that under existing conditions in that way only can production be increased and cheapened, new markets opened and developed, stability in reasonable prices secured, and industrial progress assured. But every aggregation of individuals or corporations formerly independent, immediately upon its formation terminates an existing competition; whether or not some other competition may subsequently arise. The Act, as above construed, prohibits every contract or combination in restraint of competition. Size is not made the test. Two individuals, who have been driving rival express wagons between villages in contiguous states, who enter into a combination to join forces and operate a single line, restrain an existing competition, and

Act termed revolutionary

[1] United States *v.* American Tobacco Co., 164 Fed. 700, 701.

it would seem to make little difference whether they make such a combination more effective by partnership or not.

In juxtaposition with that view will be placed a contrary view[1] recently expressed by an eminent jurist and practical man of large affairs, who, after quoting sections 1 and 2 of the Act in question, declares that — Review by Morawetz.

On their face these prohibitions appear to enforce only established doctrines of the common law. Certainly they do not seem revolutionary or in conflict with sound political and economic policies. However, an idea has become prevalent that the Anti-Trust Act has introduced into the law some novel doctrine inconsistent with the successful conduct of trade. It has been asserted that, if enforced consistently, the Act would revolutionize modern business methods and, by making it impossible to carry on business effectively, would check our industrial progress and restrain the trade and commerce which it was designed to protect. In my opinion, this is a mistake. It is true that there are dicta in some of the opinions of the Judges which, taken alone, may furnish some basis for these views and these fears; but the mere dicta of Judges are not binding as precedents. Only actual decisions control in future cases, and it will be found that, with one exception, the actual decisions of the Supreme Court are consistent with a harmonious construction of the Act which would effect its purpose without interfering with any business methods that ever have been regarded as lawful and proper. A popular error assailed.

The cases arising under the Anti-Trust Act may be divided into four classes, viz.: Cases divided into four classes.

1. *Cases involving contracts, combinations or conspiracies to restrain the trade or commerce of other persons, or of the public generally.*

Contracts, combinations or conspiracies by means of physical force, or by means of threats of damage, or boycotting, to prevent other persons, or the public generally, from carrying on trade or commerce, are illegal at common law, and it is eminently proper that contracts, combinations, or conspiracies of that character, when in restraint of interstate or international trade or commerce, should be prohibited by an Act of Congress furnishing effective remedies for its enforcement.

The Supreme Court has decided that the first section of the Anti-Trust Act applies to contracts, combinations, or conspiracies of that character. Thus, in the Debs case (158 U. S. 564) the Supreme Court decided that a combination or conspiracy of certain railway employees to stop the operation of railways that were highways of interstate commerce was a restraint of interstate trade or commerce within the meaning of the Act. The stoppage or obstruction of the highways of interstate commerce necessarily operated as a direct restraint of the interstate commerce of the public generally. Debs case.

[1] A paper entitled "The Supreme Court and the Anti-Trust Act," in the New York *Times*, October 9, 1910, by Mr. Victor Morawetz.

Hatters' case.

In Loewe *v.* Lawlor (208 U. S. 274), sometimes called the Danbury Hatters' case, the Supreme Court decided that a combination or conspiracy by means of a boycott to stop interstate trade or commerce between certain manufacturers and their customers was in restraint of interstate trade or commerce. In this case there was not, as there was in the Debs case, a physical obstruction of trade or commerce, but the purpose and the effect of the combination or conspiracy were to restrain other persons from engaging in interstate commerce by threatening damage to their business until certain demands of those entering into the combination or conspiracy were complied with.

Interstate trade or commerce also may be restrained by a contract or combination operating as a peaceable trade boycott, without the use of force or threats of damage. In Montague *v.* Lowry (193 U. S. 38), the Supreme Court decided that the Anti-Trust Act rendered unlawful the formation of an association of the manufacturers of tiles throughout the United States and certain dealers in tiles in or near San Francisco, under an agreement that the manufacturers would not sell their products on any terms to persons who were not members of the association and that the dealers who were members would not sell to non-members except at specified prices that were more than fifty per cent higher than the prices payable by members. . . .

2. *Cases involving contracts or combinations of public carriers to increase the rates or tolls payable by the public in respect of interstate commerce.*

The Traffic cases.

The railways are the principal highways of interstate trade and commerce. If, as it was decided in the Debs case, a combination or conspiracy by physical force to stop the operation of interstate railways would be in violation of the first section of the Act because in restraint of the interstate commerce of the public, it would seem to follow, for similar reasons, that a combination or conspiracy, without resort to physical obstruction, to render the transaction of interstate commerce upon the railways more difficult or more costly would be in restraint of interstate commerce within the meaning of the Act. In the Trans-Missouri Freight Association case (166 U. S. 290), and in the Joint Traffic Association cases (171 U. S. 505, 565, 569), the Supreme Court held that contracts or combinations among railway companies to maintain rates upon competitive interstate traffic operated as a restraint of interstate trade or commerce. It was contended that a combination to maintain rates upon competitive business could not fairly be considered in restraint of commerce unless the rates themselves were unreasonable; but the Court held that, in such a case, it would not inquire into the reasonableness of the rates and that the combination must be deemed in restraint of commerce because its natural and direct effect was to maintain at a higher level than otherwise would prevail the rates payable by the public as a condition of carrying on interstate trade or commerce.

An important distinction.

These Traffic cases are not authority for the doctrine that a contract or combination among merchants or manufacturers would constitute a restraint of interstate commerce, prohibited by the first section of the

Anti-Trust Act, on the sole ground that the effect of the contract or combination was to restrict competition among the parties. Railway companies furnish the transportation necessary to enable the public to engage in interstate trade or commerce. But they are not themselves engaged in interstate trade or commerce. In the Traffic cases the stoppage of competition was in restraint of interstate commerce and unlawful, not because it restrained commerce of the railway companies which made the contracts or entered into the combinations, but because its effect was to restrain the interstate commerce of the public by imposing additional burdens upon this trade or commerce. As stated by the Supreme Court, the natural and direct effect of such contracts or combinations was to maintain rates at a higher level than otherwise would prevail.

Holding companies.

In the Northern Securities case the Supreme Court held that a combination to acquire and to vest in a holding company a majority of the stocks of two railway companies operating parallel and competing lines that were highways of interstate commerce was in restraint of interstate commerce within the meaning of the first section of the Anti-Trust Act. If, as decided in the Traffic cases, a combination among railway companies by agreement to maintain rates was in restraint of interstate commerce within the meaning of the Act, because the natural and direct effect of the combination was to maintain rates at a higher level than otherwise would prevail, it seems to follow, as a necessary sequence, that a combination to bring about the same result by uniting the ownership of two parallel and competing interstate lines would otherwise be unlawful, whether the combination be in the form of a corporation, an unincorporated joint-stock company, an ordinary partnership, or a trust.

Pooling contracts.

Prior to the decision of the Traffic cases there had been many contracts and combinations to maintain rates in respect of competitive traffic, or to divide or to pool competitive traffic; but such agreements never were regarded as practically enforceable, and there is little doubt that even prior to the passage of the Anti-Trust Act they were unlawful. Whatever view may be taken of the correctness of the decision of the Supreme Court in the Traffic cases, their importance has been greatly diminished by the enforcement of the laws prohibiting railway companies from granting secret rebates or from departing from their published rate schedules.

Necessity for uniformity of rates.

It has been contended that uniformity of rates upon competing lines as to traffic between the same points is a business necessity, and that under the decisions in the Traffic cases the railway companies cannot lawfully consult among themselves for the purpose of establishing this necessary uniformity of rates. In the opinion of the writer the Supreme Court has not decided and is not likely to decide that the Anti-Trust Act prohibits consultations among railway officials for the purpose of adjusting their rate schedules and establishing uniform rates as to competitive business, provided that the companies retain their freedom to modify these rates and do not agree to maintain them. In the Traffic cases the restraint of interstate commerce did not arise from the fact that the railway companies had consulted each other for the purpose of establish-

ing uniform rates, but it arose from the fact that they had entered into agreements or combinations to maintain rates by preventing the several companies from changing the rates as so established.

3. *Cases involving contracts or combinations that, without restraining the trade or commerce of others and without monopolizing or attempting to monopolize trade or commerce, simply diminish competition among those contracting or combining.*

Contracts diminishing competition.

The Supreme Court never has decided that contracts or combinations of this character are prohibited by the Anti-Trust Act. Although dicta may be found in the opinions of the Court which, taken without regard to the context, might seem to indicate that the Court considered that all contracts and combinations restricting competition in any degree were prohibited by the Anti-Trust Act, no such conclusion can fairly be deduced from these opinions when considered in their entirety. In some of the cases the Court held that the contracts or combinations in question were unlawful on the ground that they were "in restraint of trade or commerce," and the Court did not specifically assign as the ground of its decision that the effect or purpose of the contracts or combinations was to monopolize a branch of interstate trade or commerce in violation of the second section of the Act; but it is apparent that the Court did not proceed on the ground that every restriction of competition would constitute a prohibited restraint of commerce, without regard to the degree to which competition was eliminated. If the Court had been of opinion that every restriction of competition was in violation of the Act, it is not likely that the Court would have labored, as it did, to show that the restriction of competition was carried to such an extent as to monopolize trade or commerce. Thus, in the case of the Addyston Pipe Company (175 U. S. 211) it appeared that nearly all the manufacturers of iron pipe within thirty-six states and territories had combined under an agreement to apportion among the members of the combination the trade in iron pipe within the prescribed part of the United States. The purpose of the combination was, by establishing a community of interest among the manufacturers, to destroy competition among them and to monopolize for their benefit the trade in iron pipe. Although in its opinion the Court referred to this transaction as "in restraint of commerce," the transaction undoubtedly constituted monopolizing within the meaning of the second section of the Anti-Trust Act, and if the restriction of competition had not been carried so far as to constitute monopolizing in violation of the second section, probably it would not have been adjudged to be illegal. A combination, by a partnership or otherwise, to establish a community of interest among manufacturers controlling only a minor share of the trade in iron pipe probably would not have been condemned.

Addyston Pipe Co. case.

As pointed out above, the cases involving rate agreements among railway companies are not authority for the doctrine that contracts or combinations among merchants or manufacturers which, without monopolizing commerce, simply restrict competition among those contracting or combining, are in violation of the Anti-Trust Act. The decisions in the railroad cases were based on the ground that the natural and direct

effect of the contracts or combinations was to restrain the trade or commerce of the public by increasing the tolls upon the highways of interstate commerce.

Contracts not unlawful at common law.

At common law, contracts and combinations of the class now under consideration were not unlawful, with this exception: a contract of an individual not to exercise his craft or trade was held to be unreasonable, contrary to public policy, and void, unless the contract was incidental to carrying out some fair and lawful transaction, such as the sale of a business or good-will. This exception was for the purpose of protecting the personal liberty of individuals, and in considering the effect of the Anti-Trust Act it is not material. That Act was not passed to protect individuals against the consequences of their own acts, but, as indicated by its title, was designed to enforce the broad policy of protecting the trade and commerce of the community against unlawful restraints and monopolies. Probably Congress would have no constitutional power to pass a law merely for the regulation of private rights, by prohibiting individuals under criminal penalties from entering into mutual contracts or combinations restricting their own power to engage in interstate trade or commerce.

When restricting contracts necessary.

Many contracts and combinations that restrict competition simply among those contracting or combining are necessary to the successful conduct of trade and commerce, and such contracts and combinations always have been considered reasonable and proper throughout the civilized world. If such contracts were prohibited by the Anti-Trust Act, it would be impossible, without incurring civil and criminal liabilities, to carry on trade and commerce in the United States. Certainly Congress never intended to destroy trade and commerce by an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." . . .

Therefore, the first section should be construed as prohibiting only contracts, combinations, and conspiracies to restrain the liberty or power of others, or of the public generally, to carry on interstate and international commerce freely and without hindrance. The second section should be construed as dealing with the subject of competition and as prohibiting contracts, combinations, or conspiracies to destroy competition to such an extent as to constitute monopolizing as hereafter defined.

4. *Cases involving attempts to monopolize, or combinations or conspiracies to monopolize any part of interstate or international trade or commerce.*

Meaning of the words "to monopolize."

In construing and enforcing the Anti-Trust Act the principal difficulty is to determine the precise meaning of the words "to monopolize" as used in the second section of the Act. The question is not whether industrial monopolies are harmful or beneficial to the community, or whether the Anti-Trust Act embodies a sound economic or governmental policy. Judges cannot properly allow themselves to be influenced by their own views upon questions of political economy or of state policy. It is their duty to give effect to the will of the legislature as declared in the statutes.

The outcome of collectivism.

No more comprehensive or scientific statement than the foregoing has so far been made of the problem of problems that reaches down to the very roots of our national life as it now exists. That problem is the outcome of the mighty transition that has taken place from individualism to collectivism. As stated heretofore in the words of another: "The power of groups of men organized by incorporation as joint-stock companies, or of small knots of rich men acting in combination, has developed with unexpected strength in unexpected ways, overshadowing individuals and even communities, and showing that the very freedom of association which men sought to secure by law when they were threatened by the violence of potentates may under the shelter of the law ripen into a new form of tyranny." As that new form of tyranny has developed, there has been a corresponding and counteracting development in state power, resulting in what Judge Baldwin has happily termed "the narrowing circle of individual rights."

Growth of state power necessarily curtails individual rights.

As stated already, the new conditions which have driven the individual to depend as never before for safety upon state power have compelled that power to assert as never before its sovereign right to curtail the personal and property rights of all persons, natural and artificial, when the public welfare is involved. If in 1895, when the Supreme Court rendered its judgment in United States *v.* Knight Co., generally known as the "Sugar Trust case," it had been more thoroughly impressed with the fact that the results of the silent revolution that has taken place must now find expression through judge-made law, a different conclusion would, no doubt, have been reached.

Justice Harlan's forecast.

Mr. Justice Harlan foreshadowed all that was to come when, in his dissenting opinion in that case, he said: "This view of the scope of the Act leaves the public, so far as national power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one state to another. I cannot assent to that view. In my judgment, the General Government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one state only, but throughout the entire country, in the buying and selling of articles — especially the neces-

saries of life — that go into commerce among the states. . . . To the General Government has been committed the control of commercial intercourse among the states, to the end that it may be free at all times from any restraints except such as Congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one that can adequately deal with a matter which directly and imperiously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one state." In 1897 that larger conception influenced the judgment rendered in United States *v.* Trans-Missouri Freight Association, and in 1904 it found full expression in the Northern Securities Company case.

How the finer problems of law must be solved.

From the higher point of view thus attained, the Supreme Court is now in a position to solve, by the refined methods of judge-made law, a complex and far-reaching problem that can hardly be dealt with successfully through the coarser methods of statutory legislation. If an attempt should be made so to amend the Act in question as to make clearer the distinction between lawful agreements reasonably restraining trade and those which are pernicious in their effect, a fresh appeal to the courts for construction would be the only practical outcome.

Teachings of Roman and English law.

If the histories of Roman and English law prove anything clearly, it is the fact that as the relations of advancing societies become more complex it is the trained hand of the jurisconsult rather than that of the legislator that must solve the finer problems that arise out of them. No more difficult problems were ever presented to a judicial tribunal than those now pending before the Supreme Court of the United States, problems that are the outcome of a transition from individualism to collectivism in a complex society governed by the most nicely balanced of all constitutions. The supreme control of the nation must be asserted over interstate and international trade, including all of its instrumentalities, without too great an abridgment of individual rights under the state constitutions. Such problems can only be solved tentatively bit by bit, in the light of experience. No attempt should be made to give to that part of the Act declaring illegal "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or

Literal or strained constructions to be avoided.

commerce among the several states, or with foreign nations," a too literal or strained construction. The Act does not attempt to prohibit contracts or combinations that restrain competition in trade or commerce. The word "competition" does not appear in the Act. If it had been the intention of Congress to prohibit all contracts and combinations that in any degree diminish or restrict competition in trade or commerce, it is likely that such a purpose would have been expressed in definite terms. Under such conditions the judicial power should define as clearly as possible the line dividing the legitimate competitors, who combine fairly and justly to excel their rivals in competition through the employment of normal competitive methods, from the monopolists, who seek to suppress competition, and thereby to control prices, by preventing, through unlawful means, other concerns from entering the trade in competition with them. The prohibition should apply not so much to the form the combination may assume, or to the power its efficiency may develop, as to the use of unlawful means to attain such form or to increase such power. Perhaps it will be wise in attaining that result to again employ the convenient rule established in Davidson *v.* New Orleans, in which the Supreme Court said that in order to avoid "the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory," it would adopt "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

Line dividing legitimate competitors from monopolists.

Use of unlawful means.

"Judicial inclusion and exclusion."

Meaning of the phrase "to monopolize."

It will then be necessary to give to the phrase, to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations," a reasonable and well-ascertained meaning. As commerce cannot be monopolized as to all articles, at all places, it can be monopolized, as a rule, only as to some particular articles, and only at certain places or markets. As the Act in question prohibits monopolizing "any part" of interstate or international commerce, it appears that Congress intended to prohibit the monopolizing of such commerce in any article as to any part of the United States. It was therefore decided in Montague *v.* Lowry that a combination monopolizing trade or commerce in unset

Montague *v.* Lowry.

tiles between a part of California and other states was in violation of the Act. From that it does not follow that a combination among all the merchants or all the manufacturers dealing in, or producing, an article of commerce in a particular state or locality would necessarily be in restraint of interstate or international commerce. As the term "to monopolize" is not so definite as to render it easy to determine with certainty in every case whether it applies, the question must ever recur whether in a particular case there was such a destruction of competition and such acquisition of control of commerce as to constitute monopolizing commerce as generally understood. It seems to be taken for granted that the term "to monopolize" would not apply to an acquisition of control of less than one half of the commerce in an article, the commerce in the greater part remaining in the hands of competitors. If, however, the control of substantially more than one half of the commerce in an article is acquired, the question then arises whether the elimination of competition has been carried to a degree to render the term applicable. As Congress has indicated no test as to this important branch of the subject, the courts must find a working rule by which they can ascertain in each case whether the restriction of competition and the concentration of control of commerce have been carried far enough to become injurious to the public by conferring upon a person or group of individuals the power to control the price of some article of commerce. In the border-line cases that must arise, the question will be largely one of degree. "Under a complex civilization the lawfulness of acts often must be made to depend upon complex conditions and cannot be determined by simple rules that can be applied without the exercise of discretion and in a more or less mechanical manner. As has been pointed out by the Supreme Court, even in giving effect to constitutional provisions, questions of degree often are the controlling ones (Wisconsin Railroad Co. *v.* Jacobson, 179 U. S. 301). Similarly, in determining the lawfulness of acts of individuals, it often is necessary to pass upon questions of degree, or to determine what, under all the circumstances of a given case, is reasonable. Thus the courts may be called upon to pass upon the reasonableness of railroad rates, having regard to a multitude of conditions, including the relative adjustment of rates between different localities. Such an

How much of the commerce in an article must be monopolized?

The question of degree.

inquiry commonly would present practical difficulties at least as great as those presented by an inquiry whether a given transaction destroyed competition in interstate trade or commerce to such an extent as to put an end to reasonably competitive conditions and to constitute what is called 'monopolizing.'"[1] In the presence of such difficulties it would seem to be wise for the courts, instead of attempting to formulate a rigid rule, to again resort to "the gradual process of judicial inclusion and exclusion," determining, in the light of the common understanding of the word "monopolizing," whether or no in the particular case there has been such a destruction of competition as to put an end to reasonably competitive conditions.

Again the rule of "inclusion and exclusion."

Summary.

No excuse should be necessary for this somewhat prolonged statement of the most complex and far-reaching problem that has so far arisen out of the growth of the American Commonwealth. In the words of Savigny, "As in the life of individual men no moment of complete stillness is experienced, but a constant organic development, such also is the case in the life of nations, and in every individual element in which this collective life consists." In the life of the American people the "organic development" has been abnormally rapid, and the consequent changes have been correspondingly great. The most important phase of that organic development is that involved in the transition from individualism to collectivism out of which the problem in question arose. How can the constitutional machinery be so readjusted as to meet the changed conditions? Just as the American Constitution is the weakest in its lack of power to adapt itself to changed conditions through such formal amendments as its cumbrous machinery provides, it is the strongest in its capacity to grow and to adapt itself to changed conditions through the subtle power of a Supreme Court that can not only annul a national law, but so remould it and adapt it to changed conditions as to make it an effective working rule. There is no reason to believe that that tribunal, which has been able to solve every great problem submitted to it, save one that was not in its nature justiciable, will fail to solve the pending problem preëminently justiciable.

[1] Mr. Morawetz in article cited above.

# CHAPTER XIV

## THE OUTCOME OF OUR GROWTH

Birthtime of the nation.

When the time arrived for this nation to be born, a solemn ceremony was arranged and a herald appointed who announced the event in a Declaration which has become a part of the world's history. Every detail in the marvelous process of growth which has taken place since that time has been recorded with a fullness never before known in the life of any people. Beginning with 1790 there have been thirteen decennial censuses, each one of which has been more complete and comprehensive than its predecessor. While the data upon which generalizations may be based have been thus widening, Political Science has been teaching as never before the method by which the growth of political communities should be studied and expounded. Against such advantages in favor of the making of accurate and comprehensive generalizations stands the fact that the development of no nation was ever so rapid, so vast, so complex, — the dissolving views of change have followed each other like the pictures in a panorama. "I might plead," says Mr. Bryce, "that America changes so fast that every few years a new crop of books is needed to describe the new face which things have put on, the new problems that have appeared, the new ideas germinating among her people, the new and unexpected developments for evil as well as good of which her established institutions have been found capable."[1] And yet despite such difficulties certain products of the growth which has so far taken place stand out so clearly and distinctly defined that they cannot be mistaken.

Rapidity of its development.

Area and population of original states.

The least difficult part of the summing-up now to be made is that which involves purely material expansion. According to the census of 1790 the thirteen original states and two territories had at that time a population of 3,673,570 distributed as follows: Delaware, 59,096; Pennsylvania, 434,373; New Jersey, 184,139; Georgia, 82,548; Connecticut, 237,946; Massachusetts,

[1] *The American Commonwealth*, i, 2.

378,787; Maryland, 319,728; South Carolina, 249,073; New Hampshire, 141,885; Virginia, 747,610; New York, 340,120; North Carolina, 393,751; Rhode Island, 68,825; Southwest and Northwest Territories, 35,691. While only 326,378 square miles, less than forty per cent of their original possessions, are now included within the thirteen original states, the Republic began its career as a nation nominally possessing an area, derived through the peace treaty of 1783, of 843,246. To that the following additions have been made: —

Subsequent acquisitions.

| | |
|---|---|
| 1803. Louisiana Purchase | 875,025 |
| 1819. Florida Purchase | 70,107 |
| 1845. Texas Annexation | 389,795 |
| 1846. Oregon Country | 288,689 |
| 1848. Mexican Cession | 523,802 |
| 1853. Gadsden Purchase | 36,211 |
| 1867. Alaska | 599,446 |
| 1897. Hawaiian Islands | 6,740 |
| 1898. Porto Rico | 3,600 |
| 1898. Guam | 175 |
| 1899. Philippine Islands | 143,000 |
| 1899. Samoan Islands | 73 |
| 1901. Additional Philippines | 68 |
| Total in square miles | 3,779,977 [1] |

Existing conditions.

*The forty-six existing states and territories, their population, and the total area occupied in* 1910

| | *Ratified the Constitution* | *Area in square miles,* 1910 [2] | *Population in* 1910 |
|---|---|---|---|
| Delaware | 1787 | 2,370 | 202,322 |
| Pennsylvania | 1787 | 45,126 | 7,665,111 |
| New Jersey | 1787 | 8,224 | 2,537,167 |
| Georgia | 1788 | 59,265 | 2,609,121 |
| Connecticut | 1788 | 4,965 | 1,114,756 |
| Massachusetts | 1788 | 8,266 | 3,366,416 |
| Maryland | 1788 | 12,327 | 1,295,346 |
| South Carolina | 1788 | 30,989 | 1,515,400 |
| New Hampshire | 1788 | 9,341 | 430,572 |
| Virginia | 1788 | 42,627 | 2,061,612 |
| New York | 1788 | 49,204 | 9,113,614 |
| North Carolina | 1789 | 52,426 | 2,206,287 |
| Rhode Island | 1790 | 1,248 | 542,610 |

[1] These generally accepted figures have been slightly changed by the last census, as will appear from the following tables.

[2] These figures include also the water area.

Existing conditions.

*States subsequently admitted, in the order of their admission*

| | *Date admitted* | *Area in square miles,* 1910[1] | *Population in* 1910 |
|---|---|---|---|
| Vermont | 1791 | 9,564 | 355,956 |
| Kentucky | 1792 | 40,598 | 2,289,905 |
| Tennessee | 1796 | 42,022 | 2,184,789 |
| Ohio | 1803 | 41,040 | 4,767,121 |
| Louisiana | 1812 | 48,506 | 1,656,388 |
| Indiana | 1816 | 36,354 | 2,700,876 |
| Mississippi | 1817 | 46,865 | 1,797,114 |
| Illinois | 1818 | 56,665 | 5,638,591 |
| Alabama | 1819 | 51,998 | 2,138,093 |
| Maine | 1820 | 33,040 | 742,371 |
| Missouri | 1821 | 69,420 | 3,293,335 |
| Arkansas | 1836 | 53,335 | 1,574,449 |
| Michigan | 1837 | 57,980 | 2,810,173 |
| Florida | 1845 | 58,666 | 752,619 |
| Texas | 1845 | 265,896 | 3,896,542 |
| Iowa | 1846 | 56,147 | 2,224,771 |
| Wisconsin | 1848 | 56,066 | 2,333,860 |
| California | 1850 | 158,297 | 2,377,549 |
| Minnesota | 1858 | 84,682 | 2,075,708 |
| Oregon | 1859 | 96,699 | 672,765 |
| Kansas | 1861 | 82,158 | 1,690,949 |
| West Virginia | 1863 | 24,170 | 1,221,119 |
| Nevada | 1864 | 110,690 | 81,875 |
| Nebraska | 1867 | 77,520 | 1,192,214 |
| Colorado | 1876 | 103,948 | 799,024 |
| North Dakota | 1889 | 70,837 | 577,056 |
| South Dakota | 1889 | 77,615 | 583,888 |
| Montana | 1889 | 146,997 | 376,053 |
| Washington | 1889 | 69,127 | 1,141,990 |
| Wyoming | 1890 | 97,914 | 145,965 |
| Idaho | 1890 | 83,888 | 325,594 |
| Utah | 1895–90 | 84,990 | 373,351 |
| Oklahoma | 1907 | 70,057 | 1,657,155 |
| New Mexico[2] | | 122,634 | 327,301 |
| Arizona | | 113,956 | 204,354 |

*Outlying Possessions*

| | *Date of accession* | *Area in square miles,* 1910[1] | *Population in* 1910 |
|---|---|---|---|
| Alaska | 1867 | 590,884 | 64,356 |
| Hawaii | 1898 | 6,449 | 191,909 |
| Guam | 1899 | 201 | 10,080[3] |
| Philippines | 1899 | 119,542 | 7,635,426[4] |
| Porto Rico | 1899 | 3,435 | 1,118,012 |
| Samoa | 1900 | 81 | 6,832[3] |

[1] Includes water area.

[2] New Mexico and Arizona are completing the process which will soon entitle them to statehood.

[3] Estimated.

[4] Census of 1903.

Summary.

## AREA OF THE UNITED STATES[1]

*Area, square miles*

| | Date | Land | Water | Total |
|---|---|---|---|---|
| Original Territory | 1790 | 820,377 | 22,878 | 843,255 |
| Louisiana Purchase | 1803 | 868,896 | 11,589 | 880,485 |
| Disputed Territory | 1803 | 10,518 | 402 | 10,920 |
| Florida | 1819 | 54,861 | 3,805 | 58,666 |
| Texas | 1845 | 386,040 | 3,712 | 389,752 |
| Oregon Territory | 1846 | 281,251 | 4,085 | 285,336 |
| Mexican Cession | 1848 | 520,967 | 6,155 | 527,122 |
| Gadsden Purchase | 1853 | 31,249 | 4 | 31,253 |
| Total | | 2,974,159 | 52,630 | 3,026,789 |

| | | *Total area*[1] |
|---|---|---|
| Continental United States | | 3,026,789 |
| Alaska | 1867 | 590,884 |
| Hawaii | 1898 | 6,449 |
| Guam | 1899 | 201 |
| Philippines | 1899 | 119,542 |
| Porto Rico | 1899 | 3,435 |
| Samoa | 1900 | 81 |
| Total | | 3,747,381 |

## POPULATION OF THE UNITED STATES

*Total Area of Enumeration, Continental United States, and Noncontiguous Territory:* 1910 *and* 1900

| | 1910 | 1900 |
|---|---|---|
| The United States (total area of enumeration) | 93,402,151 | 77,256,630[2] |
| Continental United States | 91,972,266 | 75,994,575 |
| Noncontiguous territory | 1,429,885 | 1,262,055 |
| Alaska | 64,356 | 63,592 |
| Hawaii | 191,909 | 154,001 |
| Porto Rico | 1,118,012 | 953,243[3] |
| Persons in military and naval service stationed abroad | 55,608 | 91,219 |

[1] Includes water area.

[2] Includes 953,243 persons enumerated in Porto Rico in 1899.

[3] According to the census of Porto Rico, taken in 1899 under the direction of the War Department.

The rate of increase from 1900 to 1910 was 20.9 per cent for the total area of enumeration and 21 per cent for continental United States. It will be noted that Table I does not cover other possessions of the United States than the ones mentioned. Including the population of the Philippine Islands, as enumerated by the census of 1903 under the direction of the War Department, 7,635,426, and adding estimates for the islands of Guam and Samoa and the Canal Zone, the total population of the United States and possessions is about 101,100,000.[1]

Constitutional limitations an American invention.

In breaking away from the mother country, the English colonies in America made an original contribution to the Science of Politics which has deeply affected their entire after history. It has ever been an elementary principle of American constitutional law that every state legislature is endowed by its very nature with the omnipotence of the English Parliament, save so far as that omnipotence is restrained by express constitutional limitations. That principle embodies the fundamental difference that divides two kindred political systems, the one resting on the sovereignty of the people as expressed in written constitutions, the other on the sovereignty of Parliament. Such limitations, of which the European world knew nothing, grew naturally out of the process through which American legislatures came into existence. From the very beginning the powers of the colonial assemblies were more or less limited through the terms of the charters by which such assemblies were either created or recognized. In colonial times, if statutes were passed in excess of the powers conferred by the charter, the question was tested, in the first instance, in the colonial courts, or, if the matter was taken to England, by the Privy Council. After the severance from the mother country, that power to annul an unconstitutional law was simply assumed, without any express grant from the people, by the state courts. Paper constitutions, defining in a dogmatic form the circle of individual rights surrounding the citizen into which state power must not intrude, was a French invention; the right of the judicial power to strike down as void any such unlawful intrusion was an American invention, the first and only one to which our state system has so far given birth. As the invention in ques-

Powers of colonial assemblies limited by charters.

[1] Taken from Bulletin no. 109 of the Thirteenth Census of the United States, 1910.

tion has been lifted up from the state system into the federal system, its importance can hardly be overestimated. It may be said to be the corner-stone of the entire constitutional fabric.

A confederation of the old type.

Sufficient emphasis has been given already to the fact that in their first effort American statesmen exhibited no fertility whatever in the making of federal constitutions. They simply copied the one type which had existed from the days of the Greek leagues, — a confederation with the entire federal power vested and confused in a one-chamber assembly, without an executive head, without a judiciary, and without the power to tax. Our first Federal Constitution vested all power in a one-chamber Congress, which could make treaties with foreign nations, without the power to force the states to observe them; it alone could decide controversies between the states, and yet it could not enforce the final decree; it could declare war, but it could raise neither men nor money save through the old and ineffectual system of requisitions upon the states as states. Federalism, which as a system of government already stood low enough in the estimation of mankind, was put in no better plight by the first American experiment. On the contrary, the completeness of its failure served as a final demonstration that the old type of a federal government was no longer adapted to modern conditions. At that juncture a great genius appeared who was fortunately a political economist and a financier, because the mighty problem to be solved involved primarily the invention of a federal system armed first with the power to tax; second, with the power to regulate commerce with foreign nations and between jealous and discordant states. The outcome was a unique creation which differed from all preceding federal systems in the following particulars: first, it possessed the power to tax, something never heard of before in the world's history; second, the federal head was divided into three departments — legislative, executive, and judicial — operating directly upon individuals, something never heard of before in the world's history; third, the federal assembly was divided into two chambers instead of one, something never heard of before in the world's history; fourth, the federal judiciary was armed with the power to put the stamp of nullity upon a national law, something never heard of before in the world's history. By that "wholly novel theory," as Tocqueville has called it, fed-

Failure of first American experiment.

Attributes of the new creation.

eralism as a system of government has been revolutionized and placed upon an entirely new basis. Since its advent the ancient type of a federal government as embodied in the Articles of Confederation has been abolished, not only in the United States but throughout the world. It may therefore be said that the outcome of our growth is a new type of state government in which the rights of the citizen are guarded by constitutional limitations enforceable by the judicial power against all other powers; second, a new type of federal government, operating directly upon the citizen and not upon the states as corporations, and organized upon the peculiar principles described above.

Federal governments revolutionized.

The new type of federal government invented here in 1783 is asserting a marked influence upon federalism as a system of government the world over. It is even reacting upon the Constitution of the mother country, which has heretofore abhorred the idea of federation in every form. There is now pending a serious proposal for the calling of a constitutional convention to deal with the whole subject of the federation of the British Empire, — one of the most majestic, and at the same time one of the most urgently necessary measures with which British statesmanship has ever been confronted. It is hard to conceive how that incoherent mass of widely scattered dominions can be held together much longer under modern conditions, without the aid of the one natural and possible expedient. It is stated in the public press that those members of the Government who are opposed to giving Ireland the degree of independence possessed by Canada and Australia, are "willing to concede to her relations to the Imperial Government similar to those that bind Ohio to Washington or Ontario to the Dominion of Canada." The North American type of federal government has already been reproduced, with more or less exactness, in the four federal unions of Latin America: the United States of Mexico; the Argentine Nation; the United States of Brazil; and the United States of Venezuela. The superstructures of the four federal states in question approach very closely to the prototype after which they were modeled. Each embodies the "wholly novel theory" of a federal government, — strictly organized, and divided into three departments, executive, legislative, and judicial, — operating directly upon individuals and not upon states as corporations. The constitution of Mexico, which will be

Federation of British Empire.

Federal unions of Latin America.

Constitution of Mexico.

taken as typical, provides that "the supreme power of the federation is divided for its exercise into legislative, executive, and judicial. Two or more of these powers shall never be united in one person or corporation, nor shall the legislative power be vested in one individual." It is then provided that "the legislative power of the nation is vested in a general congress, which shall consist of a chamber of deputies and a senate." The exclusive powers of each house and their relations to each other as coördinate bodies are substantially the same as in the North American system. In Mexico the judicial power is vested in a Supreme Court, and in district and circuit courts, whose jurisdiction extends, in a general way, to all matters of which our federal courts have jurisdiction, except that they have no jurisdiction of causes arising under their constitution, and under laws affecting private interests only, such being vested in the state courts. Neither have the Mexican federal courts jurisdiction of cases on the ground of diverse citizenship. But the jurisdiction over controversies between a state and the citizen of another state, denied by our Eleventh Amendment, still exists in that system. The jurisdiction of the Supreme Court is appellate, except in controversies between state and state, between Union and state, as to questions of jurisdiction between the tribunals of states, between federal tribunals asserting conflicting jurisdictions, and between state and federal tribunals.[1]

A glaring solecism in Constitution of 1787.

It would be a grave error to assume that the unique federal creation as it emerged from the Federal Convention of 1787 was a complete creation, logically symmetrical in all its parts. The fact is that it rested on a glaring solecism that was never removed until the adoption of the Fourteenth Amendment. The new principle which became the basis of the more perfect union, and which imparted to it its distinctive character, was that the sum of federal power vested in the new Constitution should operate not upon states in their corporate capacity but directly upon individuals. If that principle had been carried at the time of its adoption to its logical conclusion, it would then have been settled that the individuals upon whom the new government was to act should be primarily its own citi-

[1] See the paper read by Mr. W. H. Burgess before the Texas Bar Association, July 13, 1905, entitled "A Comparative Study of the Constitutions of the United States of Mexico and the United States of America."

zens. No greater logical anomaly can be imagined than a federal government acting directly upon individuals, and yet a government without citizens in its own right. The founders of the new Constitution did not attempt to do more than establish an interstate citizenship to which they imparted the qualities of uniformity and equality by denying to every state the right to discriminate in favor of its own citizens as against those of any other state. There was no attempt whatever, either in the Constitution of 1787 itself, or in any Act of Congress passed after its adoption, to establish or define citizenship of the United States, as such, as a distinct and independent thing from state citizenship. When Dred Scott brought his suit in a United States Circuit Court to establish the freedom of himself, his wife, and their two children, the vital question was whether a free negro of African descent, whose ancestors were imported into this country and sold as slaves, could be a citizen of the United States, under the Judiciary Act, and as a citizen sue in a Circuit Court of the United States. Mr. Justice Curtis, who dissented, said: "That the Constitution itself has defined citizenship of the United States by declaring what persons, born within the several states, shall or shall not be citizens of the United States, will not be pretended. It contains no such declaration."[1] It was not so defined because it did not exist even in the imaginations of the men who made the Constitution of 1787; it was an aftergrowth that emerged from the newborn spirit of nationality that Constitution created. After the conception of a national citizenship thus came into being, it was defined for the first time in that section of the Fourteenth Amendment which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In describing the Act of Settlement, Hallam has said that it is "the seal of our constitutional laws, the complement of the Revolution itself, and the Bill of Rights."[2] So it may be said

A government without citizens.

Vital question in Dred Scott case.

New citizenship created by Fourteenth Amendment.

[1] 19 How. 575.

[2] *Const. Hist.*, iii, 196.

that the section in question, which created the new national citizenship and then guarded it by a new Magna Carta, is the constitutional capstone of our nationality finally put in place by the hand of civil war. It is really a new creation, and as such the most important product of our national growth since the adoption of the Constitution itself.

Transition from individualism to collectivism.

It is difficult to define briefly the outcome of the silent yet profound transition that has taken place in our national life from a state of things in which the citizen was surrounded by a wide circle of individual rights, free from the intrusion of governmental power, either state or federal, to a state of things in which that circle has been seriously narrowed by the constant invasion of such power, both state and federal, at the invitation of the citizen himself. The fact is that the greater part of those who founded this Republic were driven from the mother country and from other countries by the cruel exercise of state power, and the dread of that power thus begotten was afterwards nurtured by the teachings of the French Revolution, which was primarily an explosion caused by the extreme and all-pervading enforcement of state power. It is not therefore strange that in drafting the original state constitutions the founders should have taken every possible precaution to manacle the monster representing state power with every restraint that such instruments could impose. When the time came for the advent of the existing Federal Constitution, an effort was made to attain the same end through the creation of a government of strictly delegated powers. Just after the foundations were thus laid, Jefferson returned from France (1789), engrossed by the opening scenes of the French Revolution and ready to preach the gospel of non-interference by governmental power, state or federal, within that wide circle of individual right, so clearly defined in the "Declaration of the Rights of Man." Such were the conditions under which Jefferson became the apostle of state sovereignty and decentralization. With that background clearly in view, it is hard not to be startled by the contrast when we look upon existing conditions in which "the narrowing circle of individual rights" is the product of an appeal made by the citizen himself to governmental power, state and federal, for protection against the incorporated masses marshaled against him. In the preceding chapter an effort has

Dread of state power nurtured by French Revolution.

Its effect upon Jefferson.

"Narrowing circle of individual rights."

been made to demonstrate that that changed attitude of the citizen to governmental power was the inevitable result of the growth of collectivism, the outcome "of the great industrialism, which, after a long period of preparation and gradual growth, began to reach its culminating point with the inventions and technical improvements, with the application of steam and the rise of the factory system, in England toward the end of the eighteenth century. Under this system industry was organized into a vast social operation, and was thus already socialized; but it was a system that was exploited by the individual owner of the capital at his own pleasure and for his own behoof. Under the pressure of the competition of the large industry, the small capitalist is gradually crushed out and the working producers become wage-laborers organized and drilled in immense factories and workshops. The development of this system still continues, and is enveloping the whole world. Such is the industrial revolution."[1] Charles Lamb once said that the whole Atlantic Coast presented itself to his mind as one long counter spread with wares. As we have been from the outset a commercial and industrial people, it is not strange that we should have felt the full force of this world-wide industrial revolution which has been strong enough here to change the attitude of the citizen to the state itself.

The industrial revolution.

The problems that engrossed the statesmen of this country from the adoption of the Constitution in 1789 down to the Civil War were distinctly political. The nature of the Constitution itself, the organization of governmental machinery, the reorganization of parties for the control of that machinery, the rights of nullification and secession, the constitutional right to perpetuate and extend slavery, were all questions distinctly political. Out of the transition from individualism to collect-

Transition from political to economic problems.

[1] See Kirkup's article on "Socialism" in *Enc. Brit.* 9th ed. xxii, 207. "The first forms of socialism in the nineteenth century were the offspring of two great revolutions that occurred in the eighteenth. That of Robert Owen came from the industrial revolution in England that followed the inventions of Watt, Crompton, Hargreaves, and Arkwright, revolutionizing the manufacture of textile fabrics. That of Saint-Simon was the result of the revolution in the world of thought that occurred mainly in France through the influence of Montesquieu, Voltaire, Rousseau, and the Encyclopedists." John W. Perrin on "The German Social Democracy," in the *North American Review*, October, 1910, 464.

ivism, from slavery to freedom, from an epoch of political development to one of material development, have arisen since the Civil War a set of new problems distinctly economic. Chief among them are those involved in the struggle of the masses against the power of combined money and of private monopoly now exercised by groups of men incorporated in joint-stock companies, or by small knots of very rich men acting in trust combinations. As an acute observer has recently expressed it: "Corporations have come to cover greater areas than states; have come to live under a greater variety of laws than the citizen himself; have excelled states in their budgets, and loomed bigger than whole commonwealths in their influence over the lives and fortunes of entire communities of men. Centralized business has built up vast structures of organization and equipment which overtop all states, and seem to have no match or competition except the Federal Government itself, which was not intended for such competitions. Amid a confused variety of states and statutes stands now the Colossus of business, uniform, concentrated, poised upon a single plan, governed not by votes but by commands, seeking not service but profits. . . . Many modern corporations wield revenues and command resources which no ancient state possessed, and which some modern bodies politic show no approach to in their budgets. The economic power of society itself is concentrated in them for the conduct of this, that, or the other sort of business. The functions of business are differentiated and divided amongst them, but the power of each function is massed. . . . Society, in short, has discovered a new way of massing its resources and its power of enterprise, is building up bodies economic outside its bodies politic, which may, if we do not find the means to prevent them, the means of disclosing the responsibilities of the men who compose them, dominate bodies politic themselves."[1]

Struggle of the masses against monopoly.

"The Colossus of business."

In order to deal effectively with such conditions, under which the control of daily subsistence and the means of transportation and communication of the nation has passed to the financiers, the American people has resolved to discard its old dread of governmental power. In the place of that

Old dread of governmental power discarded.

[1] Woodrow Wilson's address before the American Bar Association, August 31, 1910.

dread it has substituted the conviction that as all governments, state and federal, are the creatures of the people, it should not fear to use them as its instruments. After more than a century of profound distrust of itself the disenthralled American democracy is at last becoming conscious of its sovereign powers. By the spread of the direct primary system it is ascertaining its own will, in order that it may be applied by direct legislation, state and federal, to every problem to be solved. In an address delivered at Edinburgh, in 1883, Mr. Goschen said: "How is it that while the increasing democracy at home is insisting, with such growing eagerness, on more control by the state, we see so small a corresponding development of the same principle in the United States or in Anglo-Saxon colonies? It is clearly not simply the democratic spirit which demands so much central regulation. Otherwise we should find the same conditions in the Anglo-Saxon democracies across the seas." If that statesman should now cast his eyes upon the vastest of all Anglo-Saxon democracies, he would find it fully aroused, and more eager perhaps than that of Britain to extend state interference in every possible direction. The Secretary of Commerce and Labor has very recently declared in a public address that "there is reason to believe that by degrees the demands upon the Government have outgrown legitimate bounds. We certainly look to the Government for the accomplishment of things that have heretofore been regarded as foreign to it." With a keen appetite for legislation, in an age specially prolific of legislation, the American democracy is applying the full force of the legislative power, state and federal, to the supervision and control of corporate organization in every form it can possibly assume. That process is going on under the conviction that such organization, an indispensable convenience in the transaction of business, is not to be abolished. The purpose is to subordinate it to the public policy of the state, and to subject the actual managers who wield the power of thousands to strict legal responsibility. The legal fiction that corporations can do no wrong will no longer be permitted to shelter the governing bodies that direct and use them for illegitimate and selfish purposes, to the injury of society and the serious impairment of private rights. The ultimate end to be attained is the reëstablishment of the rights

Words of Mr. Goschen.

Abnormal demands upon Government.

Reëstablishment of rights of individual.

of the individual so far as that may be accomplished under the new conditions which the great economic and industrial revolution has brought about. That such a revolution has taken place it would be folly to deny, — "the transition we are witnessing is no equable transition of growth and normal alteration, no silent, unconscious unfolding of one age into another, its natural heir and successor." The American democracy, following in the footsteps of the English democracy, is now in the act of reconstructing political society in such a way as to make it conform to the profound changes that have already taken place in economic society. As law is simply a living and growing organism, which changes as the relations of society change, the new schemes of legislation now being enacted are simply the outward manifestations of the changes that have taken place within. In the making of such changes the two English-speaking democracies are animated with a boldness, an originality, a contempt for the past, never manifested before.

Demand for creative statesmanship.

We are in the midst of a transition that demands creative statesmanship. The old plan of "broadening down from precedent to precedent" has yielded to a manifest purpose to reexamine the entire economic and political fabric, with the definite object of inaugurating comprehensive changes through the enactment of well-digested schemes of positive law.

Unification of American law.

Out of the economic revolution which is still in progress there has arisen an insistent outcry for the unification of American law. Serious as the obstacles in the path of such an undertaking really are, they are scarcely more serious than those that impeded a like effort made in France out of which finally emerged the Code Napoléon. It had been estimated that in the France of the tenth century there were three hundred and sixty different kinds or groups of customary laws. Only with the history of such precedent conditions clearly in view can we grasp the real nature of the marvelous work of codification, made possible at last by that abrupt and profound break with the past known as the French Revolution. The effort to work a reform through the creation of a uniform code, which originated in the Constituent Assembly with the dreamers of the Rousseau school, never began in earnest until 1800, when Napoleon, as First Consul, appointed Tronchet as the head of a commission which completed the draft in four months. The

entire work, finished in about four years, was published in 1804.[1] Thus out of a prolonged and critical process finally emerged the most famous modern code of substantive law, consisting of twenty-two hundred and eighty-one sections, arranged under titles and divided into three books, preceded by a preliminary title. It was the final product of the fusion of the customary laws, — wholly excluding all feudal laws and customs, — of royal ordinances and laws of the Revolution, and of the vital principles of Roman private law, stated with the greatest possible clearness and brevity.

Code Napoléon completed in four years.

On January 1, 1900, just a century after Tronchet and his colleagues began to draft the Code Napoléon, was officially promulgated a new general code for the whole German Empire. We should be able to look with confidence for an outline of that code to the world-famous jurist, Dr. Rudolph Sohm, who was the leading member of the commission that made it.[2] From him we learn that as the farmer and the merchant are and have been the two great powers in German history, the industrial and agrarian laws that survive may be compared to the *jus civile*, while the laws of the Civil Code may be said to resemble the Roman *jus gentium*. The merchant has not inaptly been called "the father of the Civil Code of Germany," because, as commercial intercourse recognizes no national boundaries, he was naturally the first to desire a homogeneous system of civil rights. It was the mercantile element in the German cities that eventually crushed the spirit of feudalism; it was the mercantile element that opened the way for an Imperial Code by first creating a uniform system of commercial law. The first modern effort to give unity to law in Germany was made, as a prelude to the movement for national unity, by the German Bills of Exchange Law (*Wechselordnung*, 1848–50), while a general Commercial Code (*Gemeines Handelsgesetz-*

New German code of 1900.

Influence of commerce in unifying law.

[1] In 1904, the bench and bar of France celebrated the centennial anniversary of its adoption with ceremonies whose literary fruits have been gathered in two ponderous volumes, made up of papers prepared by representatives of the many countries that have adopted it. See *Le Code Civile, 1804–1904; Livre du centennaire. Publié par la société d'études législatives.* A. Rousseau, Paris, 1904. And also the excellent article suggested by the event entitled "The Code Napoléon," in *American Law Review*, Nov. and Dec., 1906, by N. M. Rose.

[2] See his article on the general theory and purpose of the code in the *Forum*, October, 1899.

*buch*), enacted in the various states between 1862 and 1866, was reënacted for the new empire in 1871.[1]

Our effort to establish uniform commercial system.

In juxtaposition with the foregoing statement as to the influence of commerce upon the unity of law in Germany should be set the fact that the first step toward the making of the existing Constitution of the United States was taken in January, 1786, when Virginia issued the call for a convention of states to meet at Annapolis, in order to consider the establishment of a uniform commercial system. When Maryland prompted Virginia to take that step by proposing that commissioners from all the states should be invited to meet and regulate the restrictions on commerce for the whole, Madison saw at once the advantage of "a politico-commercial commission" for the continent.[2] The outcome of the meeting at Annapolis was the call for a convention "to meet at Philadelphia on the second Monday of the next May to consider the situation of the United States." All the world now knows that three years and a half prior to the meeting of the Annapolis Convention, Pelatiah Webster, a retired merchant of Philadelphia, who was the greatest political economist of that day in this country, put forth, on February 16, 1783, as his invention, the entirely new plan of federal government embodied in the existing Constitution of the United States. Just as it may be said that the merchant was "the father of the Civil Code of Germany," so it may be said that a merchant was "the father of the Constitution of the United States." In the plan of the great architect large space is given to the influence of the merchant. "I therefore humbly propose," he said, "if the merchants in the several states are disposed to send delegates from their body, to meet and attend the sitting of Congress, that they shall be permitted to form a chamber of commerce, and their advice to Congress be demanded and admitted concerning all bills before Congress, *as far as the same may affect the trade of the states*. . . . It will give dignity, *uniformity*, and safety to our trade." While Pelatiah Webster's dream of a uniform system of federal taxation, enforceable by a self-sustaining system of federal government, has been fully realized, his dream of a uniform commercial system, resting on the "uniformity" of law, has been thwarted

A merchant the father of the Constitution.

[1] See above, p. 25.

[2] Cf. Bancroft, *Hist. of the Const.*, i, 252.

by the existence of independent sovereignties which stand to each other, so far as their domestic codes are concerned, almost like foreign nations. Out of that condition of things has arisen a "conflict of laws" whose embarrassments are endless. Against those embarrassments the commercial elements of this country are now struggling as never before, because, as the commercial relations of the states become more intimate and more complex, the disadvantages incident to the conflict deepen in intensity. Why such embarrassments are not actually greater than they are it is hard to understand when we consider the number of law-making bodies and the number of supreme tribunals in active operation. No country in the world has ever been inundated by such floods of law, statutory and judge-made, as are now streaming from the forty-six state sovereignties and the one federal sovereignty by which we are governed. In comparison the books containing the statutory and judge-made law of England are a mere handful. The late Judge W. W. Howe[1] called attention not long ago to the fact that, comparing the size of the pages, the forty-sixth volume of Louisiana Annual Reports for the year 1894 contains as much matter as the entire Digest or Pandect, into which was condensed the judge-made law evolved at Rome during a thousand years.

"Conflict of laws."

Forty-seven sources of statute law.

As the states must abide so long as the Union abides, the nation must learn as it grows older to draw all possible benefits from the two systems of law, while minimizing the inconveniences and conflicts necessarily arising out of the existence of two systems. Such inconveniences and conflicts have greatly multiplied recently as rapid intercommunication has drawn the states nearer together than ever before, and as the startling growth of governmental power, state and federal, has intruded itself, as never before, into the private life of the citizen, following as it does the apothecary to his laboratory, the dairyman to his churn, the butcher to his shambles, and the baker to his oven. The widening circle of governmental power has intensified the difficulties affecting both commerce and labor first, by reason of conflicting state codes; second, by reason of the lack of uniformity between state and federal laws touching the same subject-matter. The result has been an outcry from

Inconveniences increase with rapid intercommunication.

[1] *Studies in the Civil Law*, 67.

Four great agencies at work.

many interests, which, during the last twenty years, has set in motion four great agencies now working together with perfect harmony and efficiency in the effort to unify American law.

American Bar Association and its yoke-fellow.

First among those agencies stands the American Bar Association, which for years has been doing its utmost to bring about unity in state legislation upon subjects of common interest, through its standing committee upon "Uniform State Laws." In order to render that branch of its work more effective, an affiliated association was created in 1890 by an Act of the New York Legislature authorizing the appointment of "Commissioners for the promotion of uniformity of legislation in the United States." These affiliated associations, yoked together by their by-laws, have accomplished great things already. Nineteen national conferences of commissioners from different states and territories have been held, there being now forty-eight states and territories, including the District of Columbia and the Philippine Islands, represented in the Conference.

Results already attained.

The Uniform Negotiable Instruments Act (approved by the Conference in 1896) has been adopted in thirty-eight states and territories. The Uniform Warehouse Receipts Act (approved by the Conference in 1906) has been adopted in eighteen states. The Uniform Sales Act (approved by the Conference in 1906) has been adopted in six states. The Uniform Stock Transfer Act (approved by the Conference in 1909) is now being presented to the several state legislatures. The Uniform Bills of Lading Act was adopted at the Conference in 1909, after the most careful criticism by the large interests affected. The Conference still has under consideration the draft of a Uniform Partnership Act, and also the draft of a Uniform Incorporation Act. All of these acts have been prepared in response to the pressing need of the business world to remove as far as possible the uncertainty and vexation arising from the widely differing laws of the states and territories on matters of daily importance.

National Civic Federation.

While the work of unifying state legislation was thus advancing under the direction of the American Bar Association and its worthy yoke-fellow, a new force appeared in the corporate person of the National Civic Federation, which recently held a conference at Washington, "after consultation with other bodies interested in promoting uniform legislation by the states of the Union." The horizon has been widened by the

work of the Federation, whose programme has swept into the struggle for unity in state laws such subjects as public accounting, anti-trust and railway regulation, state banking, life and fire insurance, fire marshal laws, pure food laws, labor laws, commercial laws, vital statistics, marriage and divorce, laws relating to women and the custody of their children, and laws regulating the public health, and good roads.

That irresistible trend toward unity in state laws, which is widening and deepening every day under the impulse of commercial necessity, has somewhat suddenly brought into being still another agency destined to be more potent, perhaps, than all others in working out the final result. The creation of the annual conference of the chief executives of all the states, known already as "The House of Governors," was little less than an inspiration. This fourth institution is destined to act as a hyphen or buckle to unite the masses struggling for the unification of American law with the state legislatures through whose agency it must be brought about, if at all. Each annual conference will put each governor abreast of the movement; after each meeting he will be ready to explain to the legislature of his state how much has been accomplished and how much remains to be done with its coöperation.

"The House of Governors."

Thus it appears that the machinery is all complete, and the public mind thoroughly aroused by the pressure of a necessity that grows more urgent every day. All that is lacking is a more comprehensive and scientific understanding of the end to be finally attained. The time has arrived when the American people must awake to the fact that the movement now dealing with the unification of state law piecemeal must undertake the construction of a comprehensive and typical code of state law, embracing all the subjects of legislation common to all, which each state may enact as its own with as little change as possible. It is manifest that without a common standard or ideal to which all may approach, the unification of American state law is impossible. Nothing could be more fortunate than the gradual and almost unconscious approach which has so far been made toward such an ideal. The fact that thirty-eight states and territories have been able to adopt a Uniform Negotiable Instruments Act, the fact that eighteen states and territories have been able to adopt a Uniform Warehouse Receipts Act, puts the

Need for a typical code of state law.

fact beyond question that all may be induced gradually to adopt a scientifically constructed state code embracing every other subject in which they have a common interest. Under the auspices of the four great agencies now at work should be constructed such a code of state law, substantive and adjective, condensing within a reasonably narrow compass the fruits of our entire legal development. Such fruits should be so formulated as to embrace all the leading subjects in which the states have a common interest. The experience we have had already in the making of state codes should greatly facilitate the work, which should be one rather of selection than creation. "The House of Governors" can easily arrange an equitable scheme by which all the states may contribute, upon the basis of population, to the expense of maintaining an interstate code commission to consist of jurists of the highest order. As the Code Napoléon was completed from the first draft to the finish in four years, certainly that time should suffice for an undertaking that is nothing more than an enlargement of the work in which the "Commissioners for the promotion of uniformity of legislation in the United States" are now engaged. There is no reason why an interstate code commission should not be developed, in whole or in part, out of the ranks of that worthy and successful organization. After a typical code of state law has been perfected by such a code commission, the state legislatures can be induced to adopt it under the pressure of public opinion by the normal process through which state codes are now adopted or revised at stated intervals. We all know how willing the younger states are to reproduce, in whole or in part, the codes of a few of the older states. If a common standard could once be set up, that inclination would become universal.

How it should be constructed.

How it may be adopted.

Before an Interstate Code Commission can be organized, Congress should begin to wipe out the confusion now existing in our federal statutes, little less than a national disgrace, by the creation of a Federal Code Commission, to be charged with the duty of making a really scientific code of federal law, substantive and adjective. The proposal recently made by the President for a commission to prepare a code of adjective law or procedure is too narrow; the work of such a commission should embrace also the substantive law, which is in sore need of careful revision. The two entirely independent commis-

Need of a Federal Code Commission.

sions should promote the common object by working side by side at Washington. In that way they would be able to devise harmonious regulations as to subjects upon which both state and nation must legislate, defining more clearly at the same time where state power should end and where federal power should begin. One half of the conflicts that now arise are caused by the absence of such legislation. Above all, two such bodies, working independently and yet in concert, should be able to formulate a simple system of legal procedure, embracing the enforcement of both legal and equitable rights, for the common use of all tribunals, state and federal. That part of the work alone would save millions annually to the nation in the expenses and delays of litigation. Rich as we are, we cannot afford to prolong existing systems, reeking with unnecessary and oppressive expenditures, apart from the constant miscarriages of justice.

Need of a simpler system of legal procedure.

This far-reaching question has been thus presented in conclusion, because it is an outcome of our growth which demands for its solution the highest skill of the jurist and legislator. That solution can no longer be put off, — the insistence of its advocates is backed by the outcry of pressing commercial necessity. Certainly nothing could do more to strengthen our new national life than the unification of American law through voluntary state action. Nothing could do more to defend us against the dangers of sectionalism, referred to by Washington in his Farewell Address as attending "geographical discriminations, — Northern and Southern, Atlantic and Western, — whence designing men may endeavor to excite a belief that there is a real difference of local interests and views. One of the expedients of party to acquire influence within particular districts is to misrepresent the opinions and aims of other districts. You cannot shield yourselves too much against the jealousies and heartburnings which spring from these misrepresentations; they tend to render alien to each other those who ought to be bound together by fraternal affection."

National life should be strengthened through unification of law.

# APPENDIX

## SELECT DOCUMENTS ILLUSTRATIVE OF AMERICAN CONSTITUTIONAL HISTORY

# APPENDIX

## I

## ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND, 1643[1]



Betweene the plantations vnder the Gouernment of the Massachusetts, the Plantacons vnder the Gouernment of New Plymouth, the Plantacons vnder the Gouernment of Connectacutt, and the Gouernment of New Haven with the Plantacons in combinacon therewith

WHEREAS wee all came into these parts of America with one and the same end and ayme, namely, to advaunce the kingdome of our Lord Jesus Christ, and to enjoy the liberties of the Gospell in puritie with peace. And whereas in our settleinge (by a wise Providence of God) we are further dispersed vpon the Sea Coasts and Riuers then was at first intended, so that we cannot according to our desire, with convenience communicate in one Gouernment and Jurisdiccon. And whereas we live encompassed with people of seuerall Nations and strang languages which heareafter may proue injurious to vs or our posteritie. And forasmuch as the Natives have formerly committed sondry insolences and outrages vpon seueral Plantacons of the English and have of late combined themselues against vs. And seing by reason of those sad Distraccons in England, which they have heard of, and by which they know we are hindred from that humble way of seekinge advise or reapeing those comfortable fruits of protection which at other tymes we might well expecte. Wee therefore doe conceiue it our bounden Dutye without delay to enter into a present consotiation amongst our selues for mutual help and strength in all our future concernements: That as in Nation and Religion, so in other Respects we bee and continue one according to the tenor and true meaninge of the ensuing Articles: Wherefore it is fully agreed and concluded by and betweene the parties or Jurisdiccons aboue named, and they joyntly and seuerally doe by these presents agreed and concluded that they all bee, and henceforth bee called by the Name of the United Colonies of New-England.

II. The said United Colonies, for themselues and their posterities, do joyntly and seuerally, hereby enter into a firme and perpetuall league of friendship and amytie, for offence and defence, mutuall advise and

[1] A title taken directly from the Seven United Provinces of the Netherlands.

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succour, vpon all just occations, both for preserueing and propagateing the truth and liberties of the Gospel, and for their owne mutuall safety and wellfare.

III. It is futher agreed That the Plantacons which at present are or hereafter shalbe settled within the limmetts of the Massachusetts, shalbe forever vnder the Massachusetts, and shall have peculiar Jurisdiccon among themselues in all cases as an entire Body, and that Plymouth, Connecktacutt, and New Haven shall eich of them haue like peculier Jurisdiccon and Gouernment within their limmetts and in referrence to the Plantacons which already are settled or shall hereafter be erected or shall settle within their limmetts respectiuely; prouided that no other Jurisdiccon shall hereafter be taken in as a distinct head or member of this Confederacon, nor shall any other Plantacon or Jurisdiccon in present being and not already in combynacon or vnder the Jurisdiccon of any of these Confederats be received by any of them, nor shall any two of the Confederats joyne in one Jurisdiccon without consent of the rest, which consent to be interpreted as is expressed in the sixth Article ensuinge.

IV. It is by these Confederats agreed that the charge of all just warrs, whether offensiue or defensiue, upon what part or member of this Confederaccon soever they fall, shall both in men and provisions, and all other Disbursements, be borne by all the parts of this Confederacon, in different proporcons according to their different abilitie, in manner following, namely, that the Commissioners for eich Jurisdiccon from tyme to tyme, as there shalbe occation, bring a true account and number of all the males in every Plantacon, or any way belonging to, or under their seuerall Jurisdiccons, of what quality or condicion soeuer they bee, from sixteene yeares old to threescore, being Inhabitants there. And That according to the different numbers which from tyme to tyme shalbe found in eich Jurisdiccon, upon a true and just account, the service of men and all charges of the warr be borne by the Poll: Eich Jurisdiccon, or Plantacon, being left to their owne just course and custome of rating themselues and people according to their different estates, with due respects to their qualites and exemptions among themselues, though the Confederacon take no notice of any such priviledg: And that according to their differrent charge of eich Jurisdiccon and Plantacon, the whole advantage of the warr (if it please God to bless their Endeavours) whether it be in lands, goods or persons, shall be proportionably deuided among the said Confederats.

V. It is further agreed That if any of these Jurisdiccons, or any Plantacons vnder it, or in any combynacon with them be envaded by any enemie whomsoeuer, vpon notice and request of any three majestrats of that Jurisdiccon so invaded, the rest of the Confederates, without any further meeting or expostulacon, shall forthwith send ayde to the Confederate in danger, but in different proporcons; namely, the Massachusetts an hundred men sufficiently armed and provided for such a service and jorney, and eich of the rest fourty-fiue so armed and provided, or any lesse number, if lesse be required, according to this proporcon.

But if such Confederate in danger may be supplyed by their next Confederate, not exceeding the number hereby agreed, they may craue help there, and seeke no further for the present. The charge to be borne as in this Article is exprest: And, at the returne, to be victualled and supplyed with poder and shott for their journey (if there be neede) by that Jurisdiccon which employed or sent for them: But none of the Jurisdiccons to exceed these numbers till by a meeting of the Commissioners for this Confederacon a greater ayd appeare necessary. And this proporcon to continue, till upon knowledge of greater numbers in eich Jurisdiccon which shalbe brought to the next meeting some other proporcon be ordered. But in any such case of sending men for present ayd whether before or after such order or alteracon, it is agreed that at the meeting of the Commissioners for this Confederacon, the cause of such warr or invasion be duly considered: And if it appeare that the fault lay in the parties so invaded, that then that Jurisdiccon or Plantacon make just Satisfaccon, both to the Invaders whom they have injured, and beare all the charges of the warr themselves without requireing any allowance from the rest of the Confederats towards the same. And further, that if any Jurisdiccon see any danger of any Invasion approaching, and there be tyme for a meeting, that in such case three majestrats of that Jurisdiccon may summon a meeting at such convenyent place as themselues shall think meete, to consider and provide against the threatned danger, Provided when they are met they may remoue to what place they please, Onely whilst any of these foure Confederats have but three majestrats in their Jurisdiccon, their request or summons from any two of them shalbe accounted of equall force with the three mentoned in both the clauses of this Article, till there be an increase of majestrats there.

VI. It is also agreed that for the mannaging and concluding of all affairs proper and concerneing the whole Confederacon, two Commissioners shalbe chosen by and out of eich of these foure Jurisdiccons, namely, two for the Massachusetts, two for Plymouth, two for Connectacutt and two for New Haven; being all in Church fellowship with us, which shall bring full power from their seuerall generall Courts respectively to heare, examine, weigh and determine all affaires of our warr or peace, leagues, ayds, charges and numbers of men for warr, division of spoyles and whatsoever is gotten by conquest, receiueing of more Confederats for plantacons into combinacon with any of the Confederates, and all thinges of like nature which are the proper concomitants or consequence of such a confederacon, for amytie, offence and defence, not intermeddleing with the gouernment of any of the Jurisdiccons which by the third Article is preserued entirely to themselves. But if these eight Commissioners, when they meete, shall not all agree, yet it is concluded that any six of the eight agreeing shall have power to settle and determine the business in question: But if six do not agree, that then such proposicons with their reasons, so farr as they have beene debated, be sent and referred to the foure generall Courts, vizt. the Massachusetts, Plymouth, Connectacutt, and New Haven: And if at all the said

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Generall Courts the businesse so referred be concluded, then to bee prosecuted by the Confederates and all their members. It is further agreed that these eight Commissioners shall meete once every yeare, besides extraordinary meetings (according to the fift Article) to consider, treate and conclude of all affaires belonging to this Confederacon, which meeting shall ever be the first Thursday in September. And that the next meeting after the date of these presents, which shalbe accounted the second meeting, shalbe at Bostone in the Massachusetts, the third at Hartford, the fourth at New Haven, the fift at Plymouth, the sixt and seaventh at Bostone. And then Hartford, New Haven and Plymouth, and so in course successiuely, if in the meane tyme some middle place be not found out and agreed on which may be commodious for all the jurisdiccons.

VII. It is further agreed that at eich meeting of these eight Commissioners, whether ordinary or extraordinary, they, or six of them agreeing, as before, may choose their President out of themselues, whose office and worke shalbe to take care and direct for order and a comely carrying on of all proceedings in the present meeting. But he shalbe invested with no such power or respect as by which he shall hinder the propounding or progresse of any businesse, or any way cast the Scales, otherwise then in the precedent Article is agreed.

VIII. It is also agreed that the Commissioners for this Confederacon hereafter at their meetings, whether ordinary or extraordinary, as they may have commission or opertunitie, do endeavoure to frame and establish agreements and orders in generall cases of a civill nature wherein all the plantacons are interested for preserving peace among themselves, and preventing as much as may bee all occations of warr or difference with others, as about the free and speedy passage of Justice in every Jurisdiccon, to all the Confederats equally as their owne, receiving those that remoue from one plantacon to another without due certefycats; how all the Jurisdiccons may carry it towards the Indians, that they neither grow insolent nor be injured without due satisfaccion, lest warr break in vpon the Confederates through such miscarryage. It is also agreed that if any servant runn away from his master into any other of these confederated Jurisdiccons, That in such Case, vpon the Certyficate of one Majistrate in the Jurisdiccon out of which the said servant fled, or upon other due proofe, the said servant shalbe deliuered either to his Master or any other that pursues and brings such Certificate or proofe. And that vpon the escape of any prisoner whatsoever or fugitiue for any criminal cause, whether breaking prison or getting from the officer or otherwise escaping, upon the certificate of two Majistrats of the Jurisdiccon out of which the escape is made that he was a prisoner or such an offender at the tyme of the escape. The Majestrates or some of them of that Jurisdiccon where for the present the said prisoner or fugitive abideth shall forthwith graunt such a warrant as the case will beare for the apprehending of any such person, and the delivery of him into the hands of the officer or other person that pursues him. And if there be help required for the safe returneing of any such offender, then

it shalbe graunted to him that craves the same, he paying the charges thereof.

IX. And for that the justest warrs may be of dangerous consequence, espetially to the smaler plantacons in these vnited Colonies, It is agreed that neither the Massachusetts, Plymouth, Connectacutt nor New-Haven, nor any of the members of any of them shall at any tyme hereafter begin, undertake, or engage themselues or this Confederacon, or any part thereof in any warr whatsoever (sudden exegents with the necessary consequents thereof excepted, which are also to be moderated as much as the case will permit) without the consent and agreement of the forenamed eight Commissioners, or at least six of them, as in the sixt Article is provided: And that no charge be required of any of the Confederats in case of a defensiue warr till the said Commissioners haue mett and approued the justice of the warr, and have agreed vpon the sum of money to be levyed, which sum is then to be payd by the severall Confederates in proporcon according to the fourth Article.

X. That in extraordinary occations when meetings are summoned by three Majistrats of any Jurisdiccon, or two as in the fift Article, If any of the Commissioners come not, due warneing being given or sent, It is agreed that foure of the Commissioners shall have power to direct a warr which cannot be delayed and to send for due proporcons of men out of eich Jurisdiccon, as well as six might doe if all mett; but not less than six shall determine the justice of the warr or allow the demaunde of bills of charges or cause any levies to be made for the same.

XI. It is further agreed that if any of the Confederates shall hereafter break any of these present Articles, or be any other wayes injurious to any one of thother Jurisdiccons, such breach of Agreement, or injurie, shalbe duly considered and ordered by the Commissioners for thother Jurisdiccons, that both peace and this present Confederacon may be entirely preserued without violation.

XII. Lastly, this perpetuall Confederacon and the several Articles and Agreements thereof being read and seriously considered, both by the Generall Court for the Massachusetts, and by the Commissioners for Plymouth, Connectacutt and New Haven, were fully allowed and confirmed by three of the forenamed Confederates, namely, the Massachusetts, Connectacutt and New-Haven, Onely the Commissioners for Plymouth, having no Commission to conclude, desired respite till they might advise with their Generall Court, wherevpon it was agreed and concluded by the said court of the Massachusetts, and the Commissioners for the other two Confederates, That if Plymouth Consent, then the whole treaty as it stands in these present articles is and shall continue firme and stable without alteracon: But if Plymouth come not in, yet the other three Confederates doe by these presents confirme the whole Confederacon and all the Articles thereof, onely, in September next, when the second meeting of the Commissioners is to be at Bostone, new consideracon may be taken of the sixt Article, which concernes number of Commissioners for meeting and concluding the affaires of this Confederacon to the satisfaccon of the court of the Massachusetts, and

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the Commissioners for thother two Confederates, but the rest to stand vnquestioned.

In testymony whereof, the Generall Court of the Massachusetts by their Secretary, and the Commissioners for Connectacutt and New-Haven haue subscribed these presente articles, this xixth of the third month, commonly called May, Anno Domini, 1643.

At a Meeting of the Commissioners for the Confederacon, held at Boston, the Seaventh of September. It appeareing that the Generall Court of New Plymouth, and the severall Towneships thereof have read, considered and approoued these articles of Confederacon, as appeareth by Comission from their Generall Court beareing Date the xxixth of August, 1643, to Mr. Edward Winslowe and Mr. Will Collyer, to ratifye and confirme the same on their behalf, wee therefore, the Comissioners for the Mattachusetts, Conecktacutt and New Haven, doe also for our seuerall Gouernments, subscribe vnto them.

JOHN WINTHROP, Governor of Massachusetts,
THO. DUDLEY,
THEOPH. EATON,
GEO. FENWICK,
EDWA. HOPKINS,
THOMAS GREGSON.

# II

## PENN'S PLAN OF UNION — 1697

### MR. PENN'S PLAN FOR A UNION OF THE COLONIES IN AMERICA



A BRIEFE and Plaine Scheam how the English Colonies in the North parts of America, viz.: Boston, Connecticut, Road Island, New York, New Jerseys, Pensilvania, Maryland, Virginia, and Carolina may be made more usefull to the Crowne, and one another's peace and safty with an universall concurrence.

1st. That the severall Colonies before mentioned do meet once a year, and oftener if need be, during the war, and at least once in two years in times of peace, by their stated and appointed Deputies, to debate and resolve of such measures as are most adviseable for their better understanding, and the public tranquility and safety.

2d. That in order to it two persons well qualified for sence, sobriety and substance be appointed by each Province, as their Representatives or Deputies, which in the whole make the Congress to consist of twenty persons.

3d. That the King's Commissioner for that purpose specially appointed shall have the chaire and preside in the said Congresse.

4th. That they shall meet as near as conveniently may be to the most centrall Colony for use of the Deputies.

5th. Since that may in all probability, be New York both because it is near the Center of the Colonies and for that it is a Frontier and in the King's nomination, the Govr. of that Colony may therefore also be the King's High Commissioner during the Session after the manner of Scotland.

6th. That their business shall be to hear and adjust all matters of Complaint or difference between Province and Province. As, 1st, where persons quit their own Province and goe to another, that they may avoid their just debts, tho they be able to pay them, 2nd, where offenders fly Justice, or Justice cannot well be had upon such offenders in the Provinces that entertaine them, 3dly, to prevent or cure injuries in point of Commerce, 4th, to consider of ways and means to support the union and safety of these Provinces against the publick enemies. In which Congresse the Quotas of men and charges will be much easier, and more equally sett, then it is possible for any establishment made here to do; for the Provinces, knowing their own condition and one another's, can debate that matter with more freedome and satisfaction and better adjust and ballance their affairs in all respects for their common safty.

7ly. That in times of war the King's High Commissioner shall be generall or chief Commander of the severall Quotas upon service against a common enemy as he shall be advised, for the good and benefit of the whole.

# III

## COXE AND FRANKLIN'S PLAN OF UNION — 1754

APPENDIX III

PLAN of a proposed Union of the several Colonies of Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina for their mutual Defence and Security, and for the extending the British Settlements in North America.

That humble application be made for an act of Parliament of Great Britain, by virtue of which one general government may be formed in America, including all the said Colonies, within and under which government each Colony may retain its present constitution, except in the particulars wherein a change may be directed by the said act, as hereafter follows.

### PRESIDENT-GENERAL AND GRAND COUNCIL

That the said general government be administered by a President-General, to be appointed and supported by the Crown; and a Grand Council to be chosen by the representatives of the people of the several Colonies met in their respective assemblies.

It was thought that it would be best the President-General should be supported as well as appointed by the Crown, that so all disputes between him and the Grand Council concerning his salary might be prevented; as such disputes have been frequently of mischievous consequence in particular Colonies, especially in time of public danger. The quit-rents of crown lands in America might in a short time be sufficient for this purpose. The choice of members for the Grand Council is placed in the House of Representatives of each government, in order to give the people a share in this new general government, as the Crown has its share by the appointment of the President-General.

But it being proposed by the gentlemen of the Council of New York, and some other counsellors among the commissioners, to alter the plan in this particular, and to give the governors and councils of the several Provinces a share in the choice of the Grand Council, or at least a power of approving and confirming, or of disallowing, the choice made by the House of Representatives, it was said, — "That the government or constitution, proposed to be formed by the plan, consists of two branches: a President-General appointed by the Crown, and a Council chosen by the people, or by the people's representatives, which is the same thing.

"That, by a subsequent article, the council chosen by the people can effect nothing without the consent of the President-General appointed by the Crown; the Crown possesses, therefore, full one half of the power of this constitution.

"That in the British Constitution, the Crown is supposed to possess but one third, the Lords having their share.

"That the constitution seemed rather more favorable for the Crown.

"That it is essential to English liberty that the subject should not be taxed but by his own consent, or the consent of his elected representatives.

"That taxes to be laid and levied by this proposed constitution will be proposed and agreed to by the representatives of the people, if the plan in this particular be preserved.

"But if the proposed alteration should take place, it seemed as if matters may be so managed, as that the Crown shall finally have the appointment, not only of the President-General, but of a majority of the Grand Council; for seven out of eleven governors and councils are appointed by the Crown.

"And so the people in all the Colonies would in effect be taxed by their governors.

"It was therefore apprehended, that such alterations of the plan would give great dissatisfaction, and that the Colonies could not be easy under such a power in governors, and such an infringement of what they take to be English liberty.

"Besides, the giving a share in the choice of the Grand Council would not be equal with respect to all the Colonies, as their constitutions differ. In some, both governor and council are appointed by the Crown. In others, they are both appointed by the proprietors. In some, the people have a share in the choice of the council; in others, both government and council are wholly chosen by the people. But the House of Representatives is everywhere chosen by the people; and, therefore, placing the right of choosing the Grand Council in the representatives is equal with respect to all.

"That the Grand Council is intended to represent all the several Houses of Representatives of the Colonies, as a House of Representatives doth the several towns or counties of a Colony. Could all the people of a Colony be consulted and unite in public measures, a House of Representatives would be needless, and could all the Assemblies consult and unite in general measures, the Grand Council would be unnecessary.

"That a House of Commons or the House of Representatives, and the Grand Council are alike in their nature and intention. And, as it would seem improper that the King or House of Lords should have a power of disallowing or appointing Members of the House of Commons; so, likewise, that a governor and council appointed by the Crown should have a power of disallowing or appointing members of the Grand Council, who, in this constitution, are to be the representatives of the people.

"If the governor and councils therefore were to have a share in the choice of any that are to conduct this general government, it should seem more proper that they should choose the President-General. But this being an office of great trust and importance to the nation, it was thought better to be filled by the immediate appointment of the Crown.

"The power proposed to be given by the plan to the Grand Council is only a concentration of the powers of the several assemblies in certain points for the general welfare; as the power of the President-General is of the several governors in the same point.

"And as the choice therefore of the Grand Council, by the representatives of the people, neither gives the people any new powers, nor diminishes the power of the Crown, it was thought and hoped the Crown would not disapprove of it."

Upon the whole, the commissioners were of opinion, that the choice was most properly placed in the representatives of the people.

### ELECTION OF MEMBERS

That within months after the passing such act, the House of

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Representatives that happens to be sitting within that time, or that shall be especially for that purpose convened, may and shall choose members for the Grand Council, in the following proportion, that is to say, —

| | |
|---|---|
| Massachusetts Bay | 7 |
| New Hampshire | 2 |
| Connecticut | 5 |
| Rhode Island | 2 |
| New York | 4 |
| New Jersey | 3 |
| Pennsylvania | 6 |
| Maryland | 4 |
| Virginia | 7 |
| North Carolina | 4 |
| South Carolina | 4 |
| | 48 |

It was thought, that if the least Colony was allowed two, and the others in proportion, the number would be very great, and the expense heavy; and that less than two would not be convenient, as, a single person being by any accident prevented appearing at the meeting, the Colony he ought appear for would not be represented. That, as the choice was not immediately popular, they would be generally men of good abilities for business, and men of reputation for integrity, and that forty-eight such men might be a number sufficient. But, though it was thought reasonable that each Colony should have a share in the representative body in some degree according to the proportion it contributed to the general treasury, yet the proportion of wealth or power of the Colonies is not to be judged by the proportion here fixed: because it was at first agreed, that the greatest Colony should not have more than seven members, nor the least less than two; and the setting these proportions between these two extremes was not nicely attended to, as it would find itself, after the first election, from the sum brought into the treasury by a subsequent article.

### PLACE OF FIRST MEETING

— Who shall meet for the first time at the city of Philadelphia in Pennsylvania, being called by the President-General as soon as conveniently may be after his appointment.

Philadelphia was named as being nearer the centre of the Colonies, where the commissioners would be well and cheaply accommodated. The high roads, through the whole extent, are for the most part very good, in which forty or fifty miles a day may very well be, and frequently are, travelled. Great part of the way may likewise be gone by water. In summer time, the passages are frequently performed in a week from Charleston to Philadelphia and New York, and from Rhode Island to New York through the Sound, in two or three days, and from New York to Philadelphia, by water and land, in two days, by stage boats, and street carriages that set out every other day. The journey from Charleston to Philadelphia may likewise be facilitated by boats running up Chesapeake Bay three hundred miles. But if the whole journey be performed on horseback, the most distant members, viz., the two from New Hampshire and from South Carolina, may probably

render themselves at Philadelphia in fifteen or twenty days; the majority may be there in much less time.

### NEW ELECTION

That there shall be a new election of the members of the Grand Council every three years; and, on the death or resignation of any member, his place should be supplied by a new choice at the next sitting of the Assembly of the Colony he represented.

Some Colonies have annual assemblies, some continue during a governor's pleasure; three years was thought a reasonable medium as affording a new member time to improve himself in the business, and to act after such improvement, and yet giving opportunities, frequently enough, to change him if he has misbehaved.

### PROPORTION OF MEMBERS AFTER THE FIRST THREE YEARS

That after the first three years, when the proportion of money arising out of each Colony to the general treasury can be known, the number of members to be chosen for each Colony shall, from time to time, in all ensuing elections, be regulated by that proportion, yet so as that the number to be chosen by any one Province be not more than seven, nor less than two.

By a subsequent article, it is proposed that the General Council shall lay and levy such general duties as to them may appear most equal and least burdensome, etc. Suppose, for instance, they lay a small duty or excise on some commodity imported into or made in the Colonies, and pretty generally and equally used in all of them, as rum, perhaps, or wine; the yearly produce of this duty or excise, if fairly collected, would be in some Colonies greater, in others less, as the Colonies are greater or smaller. When the collector's accounts are brought in, the proportions will appear; and from them it is proposed to regulate the proportion of the representatives to be chosen at the next general election, within the limits, however, of seven and two. These numbers may therefore vary in the course of years, as the Colonies may in the growth and increase of people. And thus the quota of tax from each Colony would naturally vary with its circumstances, thereby preventing all disputes and dissatisfaction about the just proportions due from each, which might otherwise produce pernicious consequences, and destroy the harmony and good agreement that ought to subsist between the several parts of the Union.

### MEETINGS OF THE GRAND COUNCIL AND CALL

That the Grand Council shall meet once in every year, and oftener if occasion require, at such time and place as they shall adjourn to at the last preceding meeting, or as they shall be called to meet at by the President-General on any emergency; he having first obtained in writing the consent of seven of the members to such call, and sent due and timely notice to the whole.

It was thought, in establishing and governing new Colonies or settle-

ments, or regulating Indian trade, Indian treaties, etc., there would, every year, sufficient business arise to require at least one meeting, and at such meeting many things might be suggested for the benefit of all the Colonies. This annual meeting may either be at a time and place certain, to be fixed by the President-General and Grand Council at their first meeting; or left at liberty, to be at such time and place as they shall adjourn to, or be called to meet at, by the President-General.

In time of war, it seems convenient that the meeting should be in that colony which is nearest the seat of action.

The power of calling them on any emergency seemed necessary to be vested in the President-General; but, that such power might not be wantonly used to harass the members, and oblige them to make frequent long journeys to little purpose, the consent of seven at least to such call was supposed a convenient guard.

### CONTINUANCE

That the Grand Council have power to choose their speaker; and shall neither be dissolved, prorogued, nor continued sitting longer than six weeks at one time, without their own consent or the special command of the Crown.

The speaker should be presented for approbation; it being convenient, to prevent misunderstandings and disgusts, that the mouth of the Council should be a person agreeable, if possible, to the Council and President-General.

Governors have sometimes wantonly exercised the power of proroguing or continuing the sessions of assemblies, merely to harass the members and compel a compliance; and sometimes dissolve them on slight disgusts. This it was feared might be done by the President-General, if not provided against; and the inconvenience and hardship would be greater in the general government than in particular Colonies, in proportion to the distance the members must be from home during sittings, and the long journeys some of them must necessarily take.

### MEMBERS' ALLOWANCE

That the members of the Grand Council shall be allowed for their service ten shillings per diem, during their session and journey to and from the place of meeting; twenty miles to be reckoned a day's journey.

It was thought proper to allow some wages, lest the expense might deter some suitable persons from the service; and not to allow too great wages, lest unsuitable persons should be tempted to cabal for the employment, for the sake of gain. Twenty miles were set down as a day's journey, to allow for accidental hindrances on the road, and the greater expenses of travelling than residing at the place of meeting.

### ASSENT OF PRESIDENT-GENERAL AND HIS DUTY

That the assent of the President-General be requisite to all acts of the Grand Council, and that it be his office and duty to cause them to be carried into execution.

The assent of the President-General to all acts of the Grand Council was made necessary in order to give the Crown its due share of influence in this government, and connect it with that of Great Britain. The President-General, besides one half of the legislative power, hath in his hands the whole executive power.

### POWER OF PRESIDENT-GENERAL AND GRAND COUNCIL TREATIES OF PEACE AND WAR

That the President-General, with the advice of the Grand Council, hold or direct all Indian treaties, in which the general interest of the Colonies may be concerned, and make peace or declare war with Indian nations.

The power of making peace or war with Indian nations is at present supposed to be in every Colony, and is expressly granted to some by charter, so that no new power is hereby intended to be granted to the Colonies. But as, in consequence of this power, one Colony might make peace with a nation that another was justly engaged in war with; or make war on slight occasion without the concurrence or approbation of neighboring Colonies, greatly endangered by it; or make particular treaties of neutrality in case of a general war, to their own private advantage in trade, by supplying the common enemy, of all which there have been instances, it was thought better to have all treaties of a general nature under a general direction, that so the good of the whole may be consulted and provided for.

### INDIAN TRADE

That they make such laws as they judge necessary for regulating all Indian trade.

Many quarrels and wars have arisen between the colonies and Indian nations, through the bad conduct of traders, who cheat the Indians after making them drunk, etc., to the great expense of the colonies, both in blood and treasure. Particular colonies are so interested in the trade, as not to be willing to admit such a regulation as might be best for the whole; and therefore it was thought best under a general direction.

### INDIAN PURCHASES

That they make all purchases from Indians, for the Crown, of lands not now within the bounds of particular colonies, or that shall not be within their bounds when some of them are reduced to more convenient dimensions.

Purchases from the Indians, made by private persons, have been attended with many inconveniences. They have frequently interfered and occasioned uncertainty of titles, many disputes and expensive lawsuits, and hindered the settlement of the land so disputed. Then the Indians have been cheated by such private purchases, and discontent and wars have been the consequence. These would be prevented by public fair purchases.

Several of the Colony charters in America extend their bounds to the South Sea, which may perhaps be three or four thousand miles in length to one or two hundred miles in breadth. It is supposed they must in time be

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reduced to dimensions more convenient for the common purposes of government.

Very little of the land in these grants is yet purchased of the Indians.

It is much cheaper to purchase of them, than to take and maintain the possession by force; for they are generally very reasonable in their demands for land; and the expense of guarding a large frontier against their incursions is vastly great; because all must be guarded, and always guarded, as we know not where or when to expect them.

### NEW SETTLEMENTS

That they make new settlements on such purchases by granting lands in the King's name, reserving a quit-rent to the Crown for the use of the general treasury.

It is supposed better that there should be one purchaser than many; and that the Crown should be that purchaser, or the Union in the name of the Crown. By this means the bargains may be more easily made, the price not enhanced by numerous bidders, future disputes about private Indian purchases, and monopolies of vast tracts to particular persons (which are prejudicial to the settlement and peopling of the country), prevented; and, the land being again granted in small tracts to the settlers, the quit-rents reserved may in time become a fund for support of government, for defence of the country, case of taxes, etc.

Strong forts on the Lakes, the Ohio, etc., may, at the same time they secure our present frontiers, serve to defend new colonies settled under their protection; and such colonies would also mutually defend and support such forts, and better secure the friendship of the far Indians.

A particular colony has scarce strength enough to exert itself by new settlements, at so great a distance from the old; but the joint force of the Union might suddenly establish a new colony or two in those parts, or extend an old colony to particular passes, greatly to the security of our present frontiers, increase of trade and people, breaking off the French communication between Canada and Louisiana, and speedy settlement of the intermediate lands.

The power of settling new colonies is therefore thought a valuable part of the plan, and what cannot so well be executed by two unions as by one.

### LAWS TO GOVERN THEM

That they make laws for regulating and governing such new settlements, till the Crown shall think fit to form them into particular governments.

The making of laws suitable for the new colonies, it was thought, would be properly vested in the President-General and Grand Council; under whose protection they must at first necessarily be, and who would be well acquainted with their circumstances, as having settled them. When they are become sufficiently populous, they may by the Crown be formed into complete and distinct governments.

The appointment of a sub-president by the Crown, to take place in case of the death or absence of the President-General, would perhaps be an improvement of the plan; and if all the governors of particular provinces were to be

formed into a standing council of state, for the advice and assistance of the President-General, it might be another considerable improvement.

### RAISE SOLDIERS, AND EQUIP VESSELS, ETC.

That they raise and pay soldiers and build forts for the defence of any of the colonies, and equip vessels of force to guard the coasts and protect the trade on the ocean, lakes, or great rivers; but they shall not impress men in any colony, without the consent of the legislature.

It was thought, that quotas of men, to be raised and paid by the several colonies, and joined for any public service, could not always be got together with the necessary expedition. For instance, suppose one thousand men should be wanted in New Hampshire on any emergency. To fetch them by fifties and hundreds out of every colony, as far as South Carolina, would be inconvenient, the transportation chargeable, and the occasion perhaps passed before they could be assembled; and therefore it would be best to raise them (by offering bounty money and pay) near the place where they would be wanted, to be discharged again when the service should be over.

Particular colonies are at present backward to build forts at their own expense, which they say will be equally useful to their neighboring colonies, who refuse to join, on a presumption that such forts will be built and kept up, though they contribute nothing. This unjust conduct weakens the whole; but, the forts being for the good of the whole, it was thought best they should be built and maintained by the whole, out of the common treasury.

In the time of war, small vessels of force are sometimes necessary in the colonies to scour the coasts of small privateers. These being provided by the Union will be an advantage in turn to the colonies which are situated on the sea, and whose frontiers on the land-side, being covered by other colonies, reap but little immediate benefit from the advanced forts.

### POWER TO MAKE LAWS, LAY DUTIES, ETC.

That for these purposes they have power to make laws and lay and levy such general duties, imposts or taxes, as to them shall appear most equal and just (considering the ability and other circumstances of the inhabitants in the several colonies), and such as may be collected with the least inconvenience to the people; rather discouraging luxury, than loading industry with unnecessary burdens.

The laws which the President-General and Grand Council are empowered to make are such only as shall be necessary for the government of the settlements; the raising, regulating, and paying soldiers for the general service; the regulating of Indian trade; and laying and collecting the general duties and taxes. They should also have a power to restrain the exportation of provisions to the enemy from any of the colonies, on particular occasions, in time of war. But it is not intended that they may interfere with the constitution or government of the particular colonies, who are to be left to their own laws, and to lay, levy, and apply their own taxes as before.

### GENERAL TREASURER AND PARTICULAR TREASURER

That they may appoint a General Treasurer, and Particular Treasurer in government when necessary; and, from time to time, may order the

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sums in the treasuries of each government into the general treasury, or draw on them for special payments, as they find most convenient.

The treasurers here meant are only for the general funds and not for the particular funds of each colony, which remain in the hands of their own treasurers at their own disposal.

### MONEY, HOW TO ISSUE

Yet no money to issue but by joint orders of the President-General and Grand Council, except where sums have been appointed to particular purposes, and the President-General is previously empowered by an act to draw such sums.

To prevent misapplication of the money, or even application that might be dissatisfactory to the Crown or the people, it was thought necessary to join the President-General and Grand Council in all issues of money.

### ACCOUNTS

That the general accounts shall be yearly settled and reported to the several Assemblies.

By communicating the accounts yearly to each Assembly, they will be satisfied of the prudent and honest conduct of their representatives in the Grand Council.

### QUORUM

That a quorum of the Grand Council, empowered to act with the President-General, do consist of twenty-five members; among whom there shall be one or more from a majority of the Colonies.

The quorum seems large, but it was thought it would not be satisfactory to the colonies in general, to have matters of importance to the whole transacted by a smaller number, or even by this number of twenty-five, unless there were among them one at least from a majority of the colonies, because otherwise, the whole quorum being made up of members from three or four colonies at one end of the union, something might be done that would not be equal with respect to the rest, and thence dissatisfaction and discords might arise to the prejudice of the whole.

### LAWS TO BE TRANSMITTED

That the laws made by them for the purposes aforesaid shall not be repugnant, but, as near as may be, agreeable to the laws of England, and shall be transmitted to the King in Council for approbation, as soon as may be after their passing; and if not disapproved within three years after presentation, to remain in force.

This was thought necessary for the satisfaction of the Crown, to preserve the connection of the parts of the British Empire with the whole, of the members with the head, and to induce greater care and circumspection in making of the laws, that they be good in themselves and for the general benefit.

### DEATH OF THE PRESIDENT-GENERAL

That, in case of the death of the President-General, the Speaker of the Grand Council for the time being shall succeed, and be vested with the same powers and authorities, to continue till the King's pleasure be known.

It might be better, perhaps, as was said before, if the Crown appointed a Vice-President, to take place on the death or absence of the President-General; for so we should be more sure of a suitable person at the head of the colonies. On the death or absence of both, the Speaker to take place (or rather the eldest King's Governor) till his Majesty's pleasure be known.

### OFFICERS, HOW APPOINTED

That all military commission officers, whether for land or sea service, to act under this general constitution, shall be nominated by the President-General; but the approbation of the Grand Council is to be obtained, before they receive their commissions. And all civil officers are to be nominated by the Grand Council, and to receive the President-General's approbation before they officiate.

It was thought it might be very prejudicial to the service, to have officers appointed unknown to the people or unacceptable, the generality of Americans serving willingly under officers they know; and not caring to engage in the service under strangers, or such as are often appointed by governors through favor or interest. The service here meant, is not the stated, settled service in standing troops; but any sudden and short service, either for defence of our colonies, or invading the enemy's country (such as the expedition to Cape Breton in the last war; in which many substantial farmers and tradesmen engaged as common soldiers, under officers of their own country, for whom they had an esteem and affection; who would not have engaged in a standing army, or under officers from England). It was therefore thought best to give the Council the power of approving the officers, which the people will look on as a great security of their being good men. And without some such provision as this, it was thought the expense of engaging men in the service on any emergency would be much greater, and the number who could be induced to engage much less; and that therefore it would be most for the King's service and the general benefit of the nation, that the prerogative should relax a little in this particular throughout all the colonies in America; as it had already done much more in the charters of some particular colonies, viz.: Connecticut and Rhode Island.

The civil officers will be chiefly treasurers and collectors of taxes; and the suitable persons are most likely to be known by the Council.

### VACANCIES, HOW SUPPLIED

But, in case of vacancy by death or removal of any officer, civil or military, under this constitution, the Governor of the province in which such vacancy happens, may appoint, till the pleasure of the President-General and Grand Council can be known.

The vacancies were thought best supplied by the governors in each pro-

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vince, till a new appointment can be regularly made; otherwise the service might suffer before the meeting of the President-General and Grand Council.

EACH COLONY MAY DEFEND ITSELF IN EMERGENCY, ETC.

That the particular military as well as civil establishments in each colony remain in their present state, the general constitution notwithstanding; and that on sudden emergencies any colony may defend itself, and lay the accounts of expense thence arising before the President-General and General Council, who may allow and order payment of the same, as far as they judge such accounts just and reasonable.

Otherwise the union of the whole would weaken the parts, contrary to the design of the Union. The accounts are to be judged of by the President-General and Grand Council, and allowed if found reasonable. This was thought necessary to encourage colonies to defend themselves, as the expense would be light when borne by the whole; and also to check imprudent and lavish expense in such defences.

In Carey's *American Museum*, 1789, February (pp. 190–194), March (pp. 285–288), April (pp. 365–368), there is an elaborate article, "Albany Plan of Union," at the conclusion of which appears the following: —

"REMARK FEBRUARY 9, 1789

"On Reflection it now seems probable, that if the foregoing Plan or something like it had been adopted and carried into Execution, the subsequent Separation of the Colonies from the Mother Country might not so soon have happened, nor the Mischiefs suffered on both sides have occurred perhaps during another Century. For the Colonies, if so united, would have really been, as they then thought themselves, sufficient to their own Defence, and being trusted with it, as by the Plan, an Army from Britain, for that purpose would have been unnecessary; the Pretences for framing the Stamp Act would then not have existed, nor the other projects for drawing a Revenue from America to Britain by Act of Parliament, which were the Causes of the Breach & attended with such terrible Expense of Blood and Treasure; so that the different parts of the Empire might still have remained in Peace and Union. But the Fate of this Plan was singular. For then after many Days thorough Discussion of all its Parts in Congress it was unanimously agreed to, and Copies ordered to be sent to the Assembly of each province for Concurrence, and one to the Ministry in England for the Approbation of the Crown. The Crown disapproved it, as having placed too much Weight in the Democratic Part of the Constitution; and every Assembly, as having allowed too much to Prerogative. So it was totally rejected."

The above, as printed in *The Museum*, omits the word "Remark," but bears date at the bottom, Philadelphia, April 9, 1789. It was written by Dr. Franklin and accompanied the following letter: —

"Sir, I thank you for the Opportunity you propose to give me of making Alterations in these old Pieces of mine which you intend to republish in your *Museum*. I have no Inclination to make any change in them; but should like to see Proof Sheet, supposing your Copies may possibly be incorrect, and if you have no Objection, you may follow the Albany Plan with the enclosed *Remark* but not as from me.

"I am, Sir, Your humble Servant
(Signed) "B. FRANKLIN."[1]

[1] See Smyth, *The Life and Writings of Benjamin Franklin*, iii, 226–227.

# IV

## DECLARATION OF RIGHTS AND LIBERTIES MADE BY STAMP ACT CONGRESS, OCTOBER 19, 1765



THE members of this Congress, sincerely devoted, with the warmest sentiments of affection and duty to his Majesty's person and government, inviolably attached to the present happy establishment of the Protestant succession, and with minds deeply impressed by a sense of the present and impending misfortunes of the British Colonies on this continent; having considered as maturely as time will permit, the circumstances of the said colonies, esteem it our indispensable duty to make the following declarations of our humble opinion, respecting the most essential rights and liberties of the colonists, and of the grievances under which they labour, by reason of several late Acts of Parliament.

I. That his Majesty's subjects in these colonies owe the same allegiance to the Crown of Great Britain, that is owing from his subjects born within the realm, and all due subordination to that august body, the Parliament of Great Britain.

II. That his Majesty's liege subjects in these colonies are intitled to all the inherent rights and liberties of his natural born subjects, within the kingdom of Great Britain.

III. That it is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no Taxes be imposed on them but with their own consent, given personally, or by their representatives.

IV. That the people of these colonies are not, and, from their local circumstances cannot be, represented in the House of Commons in Great Britain.

V. That the only representatives of the people of these colonies are persons chosen therein by themselves, and that no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures.

VI. That all supplies to the Crown being free gifts of the people, it is unreasonable and inconsistent with the principles and spirit of the British Constitution, for the people of Great Britain to grant to his Majesty the property of the colonists.

VII. That trial by jury is the inherent and invaluable right of every British subject in these colonies.

VIII. That — [the Stamp Act] . . . by imposing taxes on the inhabitants of these colonies, and the said Act, and several other Acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.

IX. That the duties imposed by several late Acts of Parliament, from

the peculiar circumstances of these colonies, will be extremely burthensome and grievous; and from the scarcity of specie, the payment of them absolutely unpracticable.

X. That as the profits of the trade of these colonies ultimately centre in Great Britain, to pay for the manufactures which they are obliged to take from thence, they eventually contribute very largely to all supplies granted there to the Crown.

XI. That the restrictions imposed by several late Acts of Parliament on the trade of these colonies, will render them unable to purchase the manufactures of Great Britain.

XII. That the increase, prosperity, and happiness of these colonies, depend on the full and free enjoyments of their rights and liberties, and an intercourse with Great Britain mutually affectionate and advantageous.

XIII. That it is the right of the British subjects in these colonies to petition the King, or either House of Parliament.

Lastly, That it is the indispensable duty of these colonies, to the best of sovereigns, to the Mother Country, and to themselves, to endeavour by a loyal and dutiful address to his Majesty and humble applications to both Houses of Parliament, to procure the repeal of the Act for granting and applying certain stamp duties, of all clauses of any other Acts of Parliament, Whereby the jurisdiction of the admiralty is extended as aforesaid, and of the other late Acts for the restriction of American Commerce.

# V

## DECLARATORY ACT OF MARCH 18, 1766

*An Act for the better securing the dependency of his Majesty's dominions in America upon the Crown and Parliament of Great Britain*



WHEREAS several of the houses of representatives in his Majesty's colonies and plantations in America, have of late, against law, claimed to themselves, or to the general assemblies of the same, the sole and exclusive right of imposing duties and taxes upon his Majesty's subjects in the said colonies and plantations; and have, in pursuance of such claim, passed certain votes, resolutions, and orders, derogatory to the legislative authority of Parliament, and inconsistent with the dependency of the said colonies and plantations upon the Crown of Great Britain: . . . be it declared . . . That the said colonies and plantations in America have been, are, and of right ought to be, subordinate unto, and dependent upon the Imperial Crown and Parliament of Great Britain; and that the King's Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons of Great Britain, in Parliament assembled, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, in all cases whatsoever.

II. And be it further declared . . . That all resolutions, notes, orders, and proceedings, in any of the said colonies or plantations, whereby the power and authority of the Parliament of Great Britain, to make laws and statutes as aforesaid, is denied or drawn into question, are, and are hereby declared to be, utterly null and void to all intents and purposes whatsoever.

# VI

## DECLARATION OF RIGHTS AND LIBERTIES MADE BY THE FIRST CONTINENTAL CONGRESS, OCTOBER 14, 1774



WHEREAS, since the close of the last war, the British Parliament, claiming a power of right to bind the people of America, by statute in all cases whatsoever, hath in some acts expressly imposed taxes on them, and in others, under various pretences, but in fact for the purpose of raising a revenue, hath imposed rates and duties payable in these colonies, established a board of commissioners with unconstitutional powers, and extended the jurisdiction of courts of admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a county.

AND WHEREAS, in consequence of other statutes, judges, who before held only estates at will in their offices, have been made dependant on the Crown alone for their salaries, and standing armies kept in times of peace:

And it has lately been resolved in Parliament, that by force of a statute made in the thirty-fifth year of the reign of King Henry the Eighth, colonists may be transported to England, and tried there upon accusations for treasons, and misprisions, or concealments of treasons committed in the colonies; and by a late statute, such trials have been directed in cases therein mentioned.

AND WHEREAS, in the last session of Parliament, three statutes were made; "one, intituled" "An Act to discontinue in such manner and for such time as are therein mentioned, the landing and discharging, lading, or shipping of goods, wares & merchandise, at the town, and within the harbour of Boston, in the province of Massachusetts-bay, in North-America"; another, intituled "An Act for the better regulating the government of the province of the Massachusetts-bay in New-England;" and another intituled "An Act for the impartial administration of justice, in the cases of persons questioned for any act done by them in the execution of the law, or for the suppression of riots and tumults, in the province of the Massachusetts-bay in New England." And another statute was then made "for making more effectual provision for the government of the province of Quebec, &c." All which statutes are impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights.

AND WHEREAS, Assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances, and their dutiful, humble, loyal, & reasonable petitions to the

Crown for redress, have been repeatedly treated with contempt, by his Majesty's ministers of state:

The good people of the several Colonies of New-Hampshire, Massachusetts-Bay— Rhode-Island and Providence plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Newcastle, Kent and Sussex on Delaware, Maryland, Virginia, North Carolina, and South Carolina, justly alarmed at these arbitrary proceedings of Parliament and Administration, have severally elected, constituted, and appointed deputies to meet and sit in general congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties may not be subverted:

Whereupon the deputies so appointed being now assembled, in a full and free representation of these Colonies, taking into their most serious consideration, the best means of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting, and vindicating their rights and liberties, declare,

That the inhabitants of the English Colonies in North America by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts, have the following Rights:

*Resolved, N. C. D.* 1. That they are entitled to life, liberty, & property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.

*Resolved, N. C. D.* 2. That our ancestors who first settled these colonies, were at the time of their emigration from the Mother Country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realms of England.

*Resolved, N. C. D.* 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

*Resolved*, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative Council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed. But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such Acts of the British Parliament, as are, bona fide, restrained to the regulation of our external commerce for the purpose of securing the commercial advantages of the whole empire to the Mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America, without their consent.

APPENDIX VI

*Resolved, N. C. D.* 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

*Resolved,* 6. That they are entituled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

*Resolved, N. C. D.* 7. That these, his Majesty's colonies, are likewise entituled to all the immunities and privileges granted & confirmed to them by royal charters, or secured by their several codes of provincial laws.

*Resolved, N. C. D.* 8. That they have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

*Resolved, N. C. D.* 9. That the keeping a Standing Army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

*Resolved, N. C. D.* 10. It is indispensably necessary to good government, and rendered essential by the English Constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the Crown, is unconstitutional, dangerous, and destructive to the freedom of American legislation.

All and each of which the aforesaid deputies, in behalf of themselves and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.

In the course of our inquiry, we find many infringements and violations of the foregoing rights, which, from an ardent desire that harmony and mutual intercourse of affection and interest may be restored, we pass over for the present, and proceed to state such acts and measures as have been adopted since the last war, which demonstrate a system formed to enslave America.

*Resolved, N. C. D.*, That the following Acts of Parliament are infringements and violations of the rights of the colonists, and that the repeal of them is essentially necessary in order to restore harmony between Great-Britain and the American colonies, viz.: —

The several Acts of 4 Geo. 3. ch. 15, & ch. 34. — 5 Geo. 3. ch. 25 — 6 Geo. 3. ch. 52. — 7 Geo. 3. ch. 41, & ch. 46 — 8 Geo. 3. ch. 22, which impose duties for the purpose of raising a revenue in America, extend the powers of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, authorize the judges' certificate to indemnify the prosecutor from damages, that he might otherwise be liable to, requiring oppressive security from a claimant of

ships and goods seized, before he shall be allowed to defend his property, and are subversive of American rights.

Also the 12 Geo. 3. ch. 24, entituled "An Act for the better securing his Majesty's dock-yards, magazines, ships, ammunition, and stores," which declares a new offence in America, and deprives the American subject of a constitutional trial by a jury of the vincinage, by authorizing the trial of any person, charged with the committing any offence described in the said Act, out of the realm, to be indicted and tried for the same in any shire or county within the realm. Also the three Acts passed in the last session of Parliament, for stopping the port and blocking up the harbour of Boston, for altering the charter & government of the Massachusetts-bay, and that which is entituled "An Act for the better administration of Justice," &c.

Also the Act passed in the same session for establishing the Roman Catholick Religion in the province of Quebec; abolishing the equitable system of English laws, and erecting a tyranny there, to the great danger, from so total a dissimilarity of Religion, law, and government, of the neighbouring British colonies, by the assistance of whose blood and treasure the said country was conquered from France.

Also the Act passed in the same session for the better providing suitable quarters for officers and soldiers in his Majesty's service in North-America.

Also, that the keeping a standing army in several of these colonies, in time of peace, without the consent of the legislature of that colony in which such army is kept, is against law.

To these grievous acts and measures, Americans cannot submit, but in hopes that their fellow subjects in Great-Britain will, on a revision of them, restore us to that state in which both countries found happiness and prosperity, we have for the present only resolved to pursue the following peacable measures: —

1st. To enter into a non-importation, non-consumption, and non-exportation agreement or association.

2. To prepare an address to the people of Great-Britain, and a Memorial to the inhabitants of British America, &

3. To prepare a loyal address to his Majesty; agreeable to Resolutions already entered into.

# VII

## THE MECKLENBURG DECLARATION OF INDEPENDENCE OF MAY 31, 1775

### THE MECKLENBURG RESOLVES AS THEY APPEARED IN THE NORTH CAROLINA GAZETTE OF JUNE 16,[1] 1775, NO. 323, PRINTED WEEKLY AT NEW BERN, NORTH CAROLINA

APPENDIX VII

MR. WILLIAM HENRY HOYT, in his work entitled "The Mecklenburg Declaration of Independence; a study of evidence showing that the alleged early Declaration of Independence by Mecklenburg County, North Carolina, on May 20, 1775, is spurious," tells us at p. 275 that "the *North Carolina Gazette* of June 16, 1775, from which the foregoing resolves are copied, was recently found by Mr. Edward P. Moses, of Raleigh, in the library of Hayes, the residence of Samuel Johnston, the Revolutionary statesman, near Edenton, North Carolina. Mr. Moses found with it a letter of Richard Cogdell, chairman of the Craven County Committee, dated New Bern, June 18, 1775. The newspaper was undoubtedly enclosed in this letter, which bears internal evidence of having been addressed to Richard Caswell, at Philadelphia. Cogdell writes that "the Craven Committee has put into execution measures similar to those recommended by Caswell. 'We have Transmitted the Copy of Our proceedings,' he says, 'to every County and Town in the Province, and have had the pleasure to hear many Counties have adopted the same. Our County of Craven have had their private musters and Elected their Officers. . . . You'l Observe the Mecklenburg Resolves, exceeds all other Committees, or the Congress itself. I Send you the paper, wherein they are inserted as I hope this will come Soon to hand."

[1] These same resolves, with a few differences in minor details, arising, no doubt, from imperfect printing, had appeared on Tuesday, June 13, 1775, in the *South Carolina Gazette and Country Journal* of that date, conducted by Charles Crouch, a sound Whig and published in "Charles-Town," South Carolina. They also appeared at Wilmington, North Carolina, on June 23, 1775, in the *Cape Fear Mercury*, sent in Governor Martin's duplicate letter of June 30, 1775, to Lord Dartmouth; and in part, in the Northern papers.

## THE MECKLENBURG RESOLVES AS PRINTED IN THE NORTH CAROLINA GAZETTE OF JUNE 16, 1775, NO. 323

CHARLOTTE TOWN,
MECKLENBURG COUNTY,
May 31.

This Day the Committee met, and passed the following *Resolves*. APPENDIX VII

WHEREAS, by an Address presented to his Majesty by both Houses of Parliament in February last, the American Colonies are declared to be in a State of actual Rebellion, we conceive that all Laws and Commissions confirmed by, or drived from, the Authority of the King, or Parliament, are annulled and vacated, and the former civil Constitution of these Colonies for the present wholly suspended. To provide in some Degree for the Exigencies of the County in the present alarming Period, we deem it proper and necessary to pass the following *resolves*, viz.: —

1. That all Commissions, civil and Military, heretofore granted by the Crown to be exercised in these Colonies, are null and void, and the Constitution of each particular Colony wholly suspended.

2. That the Provincial Congress of each Province, under the Direction of the Great Continental Congress, is invested with all legislative and executive Powers within their respective Provinces; and that no other Legislative or Executive does or can exist, at this Time, in any of these Colonies.

3. As all former Laws are now suspended in this Province, and the Congress have not yet provided others, we judge it necessary, for the better Preservation of good Order, to form certain Rules and Regulations for the internal Government of this County, until Laws shall be provided for us by the Congress.

4. That the Inhabitants of this County do meet on a certain Day appointed by this Committee and having formed themselves into nine Companies, to wit, eight for the County, and one for the town of Charlotte, do choose a Colonel, and other Military Officers, who shall hold and exercise their several Powers by Virtue of this Choice, and independent of Great-Britain, and former Constitution of this Province.

5. That for the better preservation of the Peace and Administration of Justice, each of these Companies do choose, from their own Body, two discreet Freeholders, who shall be impowered each by himself, and singly, to decide and determine all Matters of Controversy arising within the said Company under the Sum of Twenty Shillings, and jointly and together all Controversies under the Sum of Forty Shillings, yet so as their Decisions may admit of Appeals to the Convention of the Select Men, of the Whole County; and also, that any one of these shall have Power to examine, and commit to Confinement, Persons accused of Petit Larceny.

6. That those two Select Men, thus chosen, do, jointly and together,

APPENDIX VII

choose from the Body of their particular Company two Persons, properly qualified to serve as Constables, who may assert them in the Execution of their Office.

7. That upon the Complaint of any Person to either of these Select Men, he do issue his Warrant, directed to the Constable, commanding him to bring the Aggressor before him, or them, to answer the said Complaint.

8. That these eighteen Select Men, thus appointed, do meet every third Tuesday in January, April, July, and October, at the Court-House in Charlotte, to hear and determine all Matters of Controversy for Sums exceeding Forty Shillings; also Appeals: And in Cases of Felony, to commit the Person or Persons convicted thereof to close confinement, until the Provincial Congress shall provide and establish Laws and Modes of Proceeding in such cases.

9. That these eighteen Select Men, thus convened, do choose a Clerk to record the Transactions of the said Convention; and that the said Clerk, upon the Application of any Person or Persons aggrieved do issue his Warrant to one of the Constables, to summons and warn the said Offender to appear before the Convention at their next sitting, to answer the aforesaid Complaint.

10. That any Person making Complaint upon Oath to the Clerk, or any Member of the Convention, that he has Reason to suspect that any Person or Persons indebted to him in a Sum above Forty Shillings, do intend clandestinely to withdraw from the County without paying such a Debt; the Clerk, or such Member, shall issue his Warrant to the Constable, commanding him to take the said Person or Persons into safe Custody, until the next sitting of the Convention.

11. That when a Debtor for a Sum below Forty Shillings shall abscond and leave the County, the Warrant granted as aforesaid shall extend to any Goods or Chattels of the said Debtor as may be found, and such Goods or Chattels be seized and held in Custody by the Constable for the space of Thirty Days; in which Term if the Debtor fails to return and discharge the Debt, the Constable shall return the Warrant to one of the Select Men of the Company where the Goods and Chattels were found, who shall issue Orders to the Constable to sell such a Part of the said goods as shall amount to the Sum due; that when the Debt exceeds Forty Shillings, the Return shall be made to the Convention, who shall issue the Orders for Sale.

12. That Receivers and Collectors for Quitrents, Public & County Taxes, do pay the same into the Hands of the Chairman of this Committee, to be by them disbursed as the public Exigencies may require. And that such Receivers and Collectors proceed no farther in their Office until they be approved of by, and have given to this Committee good & sufficient Security for a faithful Return of such Monies when collected.

13. That the Committee be accountable to the County for the Application of all Monies received from such Officers.

14. That all these Officers hold their Commissions during the Pleasure of their respective Constituents.

15. That this Committee will sustain all Damages that may ever hereafter accrue to all, or any of these Officers thus appointed, and thus acting, on Account of their Obedience and Conformity to these Resolves.

16. That whatever Person shall hereafter receive a Commission from the Crown, or attempt to exercise any such Commission heretofore received, shall be deemed an Enemy to his Country; and upon Information being made to the Captain of the Company where he resides, the said Captain shall cause him to be apprehended, and conveyed before the two Select Men of the said Company, who, upon Proof of the Fact, shall commit him the said Offender into safe Custody, until the next sitting of the Convention, who shall deal with him as Prudence may direct.

17. That any Person refusing to yield Obedience to the above Resolves shall be deemed equally criminal, and liable to the same Punishments as the Offenders above last mentioned.

18. That these Resolves be in full Force and Virtue, until Instructions from the General Congress of this Province, regulating the Jurisprudence of this Province, shall provide otherwise, or the Legislative Body of Great Britain resign its unjust and arbitrary Pretensions with respect to America.

19. That the several Militia Companies in this County do provide themselves with proper Arms and Accuetrements, and hold themselves in constant Readiness to execute the Commands and Directions of the Provincial Congress, and of this Committee.

20. That this Committee do appoint Colonel Thomas Polk, and Dr Joseph Kennedy, to purchase 300 lb. of powder, 600 lb. of lead, and 1000 Flints; and deposit the same in some safe place, hereafter to be appointed by the Committee.

Signed by Order of the Committee.

E. H. BREVARD,
Clerk of the Committee.

## THE NOW DISCREDITED DRAFT OF A DECLARATION OF INDEPENDENCE PURPORTING TO HAVE BEEN MADE ON MAY 20, 1775, BY A CONVENTION HELD IN CHARLOTTE, MECKLENBURG COUNTY, NORTH CAROLINA, ON THAT DAY

When in the winter of 1818–19 the subject was a topic of conversation at Washington, Senator Nathaniel Macon and William Davidson, the Representative from the Mecklenburg District, wrote to persons in that section of the country for information relative to the matter. Davidson received from Dr. Joseph McKnitt Alexander a full account of the disputed event, which he said he had copied from papers left by his father, John McKnitt Alexander. William B. Alexander, the brother of Dr. Alexander, wrote to Macon on February 7, 1819, that the latter had furnished Davidson with all that could be found.

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"Nearly all of my father's papers," he said, "were burned in the spring of 1800, which destroyed the papers now wanted, as I believe he acted as the secretary to the Committee that declared independence for this County in 1775." Macon, after endeavouring to procure information to verify statements in the document, thus received by Davidson from Dr. Alexander, sent it with an old proclamation that William B. Alexander had found among his father's papers to the Editor of the *Raleigh Register and North Carolina Gazette*, published in Raleigh, North Carolina. It appears in the issue of Friday April 30, 1819 (vol. xx, no. 1023), as follows: —

DECLARATION OF INDEPENDENCE

It is not probably known to many of our readers, that the citizens of Mecklenburg County, in this State, made a Declaration of Independence more than a year before Congress made theirs. The following Document on the subject has lately come to the hands of the Editor from unquestionable authority, and is published that it may go down to posterity.

NORTH CAROLINA, MECKLENBURG COUNTY
May 20, 1775

In the spring of 1775, the leading characters of Mecklenburg County, stimulated by that enthusiastic patriotism which elevates the mind above considerations of individual aggrandisement, and scorning to shelter themselves, from the impending storm by submission to lawless power, &c. &c., held several detached meetings, in each of which the individual sentiments were "that the cause of Boston was the cause of all"; that their destinies were indissolubly connected with those of their Eastern fellow-citizens — and that they must either submit to all the impositions which an unprincipled, and to them an unrepresentative Parliament might impose — or support their brethren who were doomed to sustain the first shock of that power, which, if successful there, would ultimately overwhelm all in the common calamity. Conformably to these principles, Col. Adam Alexander, through solicitations, issued an order to each Captain's Company in the County of Mecklenburg (then comprising the present County of Cabarrus), directing each Militia Company to elect two persons, and delegate to them ample power to devise ways and means to aid and assist their suffering brethren in Boston, and also generally to adopt measures to extricate themselves from the impending storm, & to secure unimpaired their inalienable rights, privileges, and liberties from the dominant grasp of British imposition and tyranny.

In conforming to said Order, on the 19th of May, 1775, the said delegation met in Charlotte, vested with unlimited powers; at which time official news, by express, arrived of the Battle of Lexington on that day of the preceding month.

Every delegate felt the value & importance of the prize, & the aw-

ful & solemn crisis which had arrived, — every bosom swelled with indignation at the malice, inveteracy, and insatiable revenge developed in the late attack at Lexington. The universal sentiment was: let us not flatter ourselves that popular harangues — or resolves; that popular vapor will avert the storm, or vanquish our common enemy — let us deliberate — let us calculate the issue — the probable result; and then let us act with energy as brethren leagued to preserve our property — our lives — and what is still more endearing, the liberties of America.

Abraham Alexander was then elected Chairman, and John McKnitt Alexander, Clerk. After a free and full discussion of the various objects for which the delegation had been convened, it was unanimously Ordained —

1. *Resolved*, That whosoever directly or indirectly abetted, or in any way, form or manner countenanced the unchartered and dangerous invasion of our rights, as claimed by Great-Britain, is an enemy to this Country, — to America, — and to the inherent and inalienable rights of man.

2. *Resolved*, That we the citizens of Mecklenburg County do hereby dissolve the political bands which have connected us to the Mother Country, and hereby absolve ourselves from all allegiance to the British Crown, and abjure all political connection, contract or association with that Nation, who have wantonly trampled on our rights and liberties — and inhumanly shed the innocent blood of American patriots at Lexington.

3. *Resolved*, That we do hereby declare ourselves a free and independent People, are and of right ought to be, a sovereign and self-governing Association, under the control of no power other than that of our God and the General Government of the Congress; to the maintenance of which independence, we solemnly pledge to each other our mutual co-operation, our lives, our fortunes, and our most sacred honor.

4. *Resolved*, That as we now acknowledge the existence and control of no law or legal officer, civil or military, within this County, we do hereby ordain and adopt, as a rule of life, all, each and every of our former laws, — wherein nevertheless, the Crown of Great-Britain never can be considered as holding rights, privileges, immunities or authority therein.

5. *Resolved*, That it is also further decreed, that all, each and every military officer in this County is hereby re-instated to his former command and authority, he acting conformably to these regulations. And that every member present of this delegation shall henceforth be a civil officer, viz.: a Justice of the Peace, in the character of a "Committee man," to issue process, hear and determine all matters of controversy, according to said adopted laws, and to preserve peace, and union, and harmony in said County, — and to use every exertion to spread the love of country and fire of freedom throughout America, until a more general and organized government be established in this province.

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A number of bye-laws were also added, merely to protect the Association from confusion and to regulate their general conduct as citizens.

After sitting in the Courthouse all night, neither sleepy, hungry, nor fatigued, and after discussing every paragraph, they were all passed, sanctioned and declared unanimously, about 2 o'clock, A. M. May 20. In a few days a deputation of said delegation convened, when Capt. James Jack of Charlotte was deputed as express to the Congress at Philadelphia, with a copy of said Resolves and Proceedings, together with a letter addressed to our three Representatives there, viz: Richard Caswell, Wm. Hooper and Joseph Hughes — under express injunction, personally, and through the state representation, to use all possible means to have said proceedings sanctioned and approved by the General Congress. On the return of Capt. Jack, the delegation learned that their proceedings were individually approved by the members of Congress, but that it was deemed premature to lay them before the House. A joint letter from said three members of Congress was also received, complimentary of the zeal in the common cause, and recommending perseverance, order and energy.

The subsequent harmony, unanimity and exertion in the cause of liberty and independence, evidently resulting from these regulations, and the continued exertion of said delegation, apparently tranquilised this section of the State, and met with the concurrence and high approbation of the Council of Safety, who held their sessions at Newbern and Wilmington alternately, and who confirmed the nomination and acts of the delegation in their official capacity.

From this delegation originated the Court of Enquiry of this County, who constituted and held their meetings regularly at Charlotte at Col. James Harris's and at Col. Phifer's alternately one week at each place. It was a civil Court founded on military process. Before this judicature all suspicious persons were made to appear, who were formally tried and banished, or continued under guard. Its jurisdiction was as unlimited as toryism, and its decrees as final as the confidence and patriotism of the County. Several were arrested and brought before them from Lincoln, Rowan and the adjacent counties —

[The foregoing is a true copy of the papers on the above subject, left in my hands by John M'Knitt Alexander, dec'd; I find it mentioned on file that the original book was burned April, 1800. That a copy of the proceedings was sent to Hugh Williamson in New York, then writing a History of North-Carolina, and that a copy was sent to Gen. W. R. Davie.

J. McKNITT.]

Dr. Joseph McKnitt Alexander usually omitted his surname in his signature because of the commonness of the name Alexander in Mecklenburg, and was frequently spoken of and addressed as "J. McKnitt." (*Gov. Graham's Address*, 29–30.)

Everything that could possibly be said in favor of the genuineness of the foregoing paper was said in *The Address on the Mecklenburg De-*

*claration of Independence*, delivered at Charlotte, February 4, 1875, by the Hon. Wm. A. Graham, one of the most famous statesmen and one of the loftiest characters North Carolina ever gave to the nation. In 1895 Dr. George W. Graham, the worthy and able son of a noble sire, published an address entitled *Why North Carolinians believe in the Mecklenburg Declaration of Independence*, a paper elaborated by him in his later work, *The Mecklenburg Declaration of Independence, May 20, 1775, and the Lives of its Signers* (1905). But despite the ability and character of its advocates, the case has failed not only because of the lack of contemporaneous documentary evidence, but because of many other circumstances whose discussion has swelled into quite a literature. For a full statement see the book entitled *The Mecklenburg Declaration of Independence*, by Wm. Henry Hoyt, A.M., 1907. In 1908 appeared volume I of a *History of North Carolina*, by Samuel A'Court Ashe, a native writer, who is producing perhaps the most complete and exhaustive history of North Carolina so far written. In chapter XXVI (p. 449) is contained the following conclusion which should be accepted as the last word on the subject: "These and other circumstances lead to the belief that inasmuch as none of the witnesses speak of two public meetings, at which Colonel Polk proclaimed independence, there was but one such meeting; and the Resolutions which he read were those of May 31st, published on June 13th in Charleston; June 16th in New Bern, and June 23d at Wilmington, and in part, in the Northern papers. If there was any other public meeting, it is not mentioned by any one. If there were any other Resolutions ever adopted and proclaimed, no copy was preserved."

# VIII

## VIRGINIA'S BILL OF RIGHTS OF 1776[1]

APPENDIX VIII

A DECLARATION of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity as the basis and foundation of government.

SECTION 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

SEC. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

SEC. 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefensible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

SEC. 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

SEC. 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary,[2] and that the

[1] This declaration of rights was framed by a convention, composed of forty-five members of the colonial house of burgesses, which met at Williamsburgh, May 6, 1776, and adopted this declaration June 12, 1776. The draftsman was George Mason.

[2] In the constitution adopted June 29, 1776, by the convention that issued this bill of rights, it is provided that "The legislative, executive, and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the other." These are the first complete dogmatic statements as to the division of powers ever incorporated in a formal document. See Resolve 10 of the Declaration of Rights of the First Continental Congress, October, 1776.

members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

SEC. 6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

SEC. 7. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

SEC. 8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he can not be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

SEC. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

SEC. 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fault committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

SEC. 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

SEC. 12. That freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

SEC. 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

SEC. 14. That the people have a right to uniform government; and, therefore, that no government separate from, or independent of the government of Virginia, ought to be erected or established within the limits thereof.

SEC. 15. That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, modera-

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tion, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

SEC. 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[1]

[1] Virginia's first constitution was framed by the convention that issued this bill of rights, and was adopted or declared by it June 29, 1776, without submission to the people for ratification.

# IX

## DECLARATION OF INDEPENDENCE

### In Congress, July 4, 1776

### THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA



When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: — that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained: and when so suspended he has utterly neglected to attend to them. He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish

the right of representation in the legislature — a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolution, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the State remaining, in the mean time, exposed to all the dangers of invasion from without and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers, to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States:

For cutting off our trade with all parts of the world:

For imposing taxes on us without our consent:

For depriving us, in many cases, of the benefits of trial by jury:

For transporting us beyond seas to be tried for pretended offences:

For abolishing the free system of English laws in a neighbouring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies:

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our government:

For suspending our own legislatures, and declaring themselves invested with powers to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections among us, and has endeavoured to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rules of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms: our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attention to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connection and correspondence. They too have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind — enemies in war, in peace, friends.

We, therefore, the representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, do, in the name and by the authority of the good people of these Colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as *FREE AND INDEPENDENT STATES*, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which INDEPENDENT STATES may of right do. And, for the support of this declaration, with a firm reliance on the protection of DIVINE PROVIDENCE, we mutually pledge to each other our lives, our fortunes, and our sacred honour.

JOHN HANCOCK.

*New Hampshire.*

JOSIAH BARTLETT,
WILLIAM WHIPPLE,
MATTHEW THORNTON.

*New York.*

WILLIAM FLOYD,
PHILIP LIVINGSTON,
FRANCIS LEWIS,
LEWIS MORRIS.

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*Massachusetts Bay.*

SAMUEL ADAMS,
JOHN ADAMS,
ROBERT TREAT PAINE,
ELDRIDGE GERRY.

*Rhode Island, &c.*

STEPHEN HOPKINS,
WILLIAM ELLERY.

*Connecticut.*

ROGER SHERMAN,
SAMUEL HUNTINGTON,
WILLIAM WILLIAMS,
OLIVER WOLCOTT.

*Delaware.*

CÆSAR RODNEY,
GEORGE READ,
THOMAS MCKEAN.

*Maryland.*

SAMUEL CHASE,
WILLIAM PACA,
THOMAS STONE,
CHARLES CARROLL OF CARROLLTON.

*Virginia.*

GEORGE WYTHE,
RICHARD HENRY LEE,
THOMAS JEFFERSON,
BENJAMIN HARRISON,
THOMAS NELSON, JR.,
FRANCIS LIGHTFOOT LEE,
CARTER BRAXTON.

*New Jersey.*

RICHARD STOCKTON,
JOHN WITHERSPOON,
FRANCIS HOPKINSON,
JOHN HART,
ABRAHAM CLARK.

*Pennsylvania.*

ROBERT MORRIS,
BENJAMIN RUSH,
BENJAMIN FRANKLIN,
JOHN MORTON,
GEORGE CLYMER,
JAMES SMITH,
GEORGE TAYLOR,
JAMES WILSON,
GEORGE ROSS.

*North Carolina.*

WILLIAM HOOPER.
JOSEPH HEWES,
JOHN PENN.

*South Carolina.*

EDWARD RUTLEDGE,
THOMAS HEYWARD, JR.,
THOMAS LYNCH, JR.,
ARTHUR MIDDLETON.

*Georgia.*

BUTTON GWINNETT,
LYMAN HALL,
GEORGE WALTON.

# X

## ARTICLES OF CONFEDERATION, NOV. 15, 1777[1]

*To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting*



WHEREAS the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventyseven, and in the Second Year of the Independence of America, agree to certain Articles

[1] Congress *Resolved*, on the 11th of June, 1776, that a committee should be appointed to prepare and digest the form of a confederation to be entered into between the Colonies; and on the day following, after it had been determined that the committee should consist of a member from each Colony, the following persons were appointed to perform that duty, to wit: Mr. Bartlett, Mr. S. Adams, Mr. Hopkins, Mr. Sherman, Mr. R. R. Livingston, Mr. Dickinson, Mr. M'Kean, Mr. Stone, Mr. Nelson, Mr. Hewes, Mr. E. Rutledge, and Mr. Gwinnett. Upon the report of this committee, the subject was, from time to time, debated, until the 15th of November, 1777, when a copy of the confederation being made out, and sundry amendments made in the diction, without altering the sense, the same was finally agreed to. Congress, at the same time, directed that the articles should be proposed to the legislatures of all the United States, to be considered, and if approved of by them, they were advised to authorize their delegates to ratify the same in the Congress of the United States; which being done, the same should become conclusive. Three hundred copies of the Articles of Confederation were ordered to be printed for the use of Congress; and on the 17th of November, the form of a circular letter to accompany them was brought in by a committee appointed to prepare it, and being agreed to, thirteen copies of it were ordered to be made out, to be signed by the president and forwarded to the several States, with copies of the confederation. On the 29th of November ensuing, a committee of three was appointed, to procure a translation of the articles to be made into the French language, and to report an address to the inhabitants of Canada, &c. On the 26th of June, 1778, the form of a ratification of the Articles of Confederation was adopted, and, it having been engrossed on parchment, it was signed on the 9th of July on the part and in behalf of their respective States, by the delegates of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, Pennsylvania, Virginia, and South Carolina, agreeably to the powers vested in them. The delegates of North Carolina signed on the 21st of July, those of Georgia on the 24th of July, and those of New Jersey on the 26th of November following. On the 5th of May, 1779, Mr. Dickinson and Mr. Van Dyke signed in behalf of the

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of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia in the Words following, viz.:

*Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.*

ARTICLE I. The stile of this confederacy shall be "The United States of America."

ARTICLE II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any

State of Delaware, Mr. M'Kean having previously signed in February, at which time he produced a power to that effect. Maryland did not ratify until the year 1781. She had instructed her delegates, on the 15th of December, 1778, not to agree to the confederation until matters respecting the western lands should be settled on principles of equity and sound policy; but, on the 30th of January, 1781, finding that the enemies of the country took advantage of the circumstance to disseminate opinions of an ultimate dissolution of the Union, the legislature of the State passed an act to empower their delegates to subscribe and ratify the articles, which was accordingly done by Mr. Hanson and Mr. Carroll, on the 1st of March of that year, which completed the ratifications of the act; and Congress assembled on the 2d of March under the new powers.

of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace,

except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever — of establishing rules for deciding in all

cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

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All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States — fixing the standard of weights and measures throughout the United States — regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated — establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office — appointing all officers of the land forces, in the service of the United States, excepting regimental officers — appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States — making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction — to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses — to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted — to build and equip a navy — to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater

number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secresy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

ARTICLE X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States,

for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.[1]

*On the part & behalf of the State of New Hampshire.*

JOSIAH BARTLETT, JOHN WENTWORTH, Junr., August 8th, 1778.

*On the part and behalf of the State of Massachusetts Bay.*

JOHN HANCOCK, FRANCIS DANA,
SAMUEL ADAMS, JAMES LOVELL,
ELBRIDGE GERRY, SAMUEL HOLTEN.

*On the part and behalf of the State of Rhode Island and Providence Plantations.*

WILLIAM ELLERY, JOHN COLLINS.
HENRY MARCHANT,

[1] From the circumstance of delegates from the same State having signed the Articles of Confederation at different times, as appears by the dates, it is probable they affixed their names as they happened to be present in Congress, after they had been authorized by their constituents.

*On the part and behalf of the State of Connecticut.*

ROGER SHERMAN,
SAMUEL HUNTINGTON,
OLIVER WOLCOTT,
TITUS HOSMER,
ANDREW ADAMS.

*On the part and behalf of the State of New York.*

JAS. DUANE,
FRA. LEWIS,
WM. DUER,
GOUV. MORRIS.

*On the part and in behalf of the State of New Jersey, Novr.* 26, 1778.

JNO. WITHERSPOON,
NATHL. SCUDDER.

*On the part and behalf of the State of Pennsylvania.*

ROBT. MORRIS,
DANIEL ROBERDEAU,
JONA. BAYARD SMITH,
WILLIAM CLINGAN,
JOSEPH REED, 22d July, 1778.

*On the part & behalf of the State of Delaware.*

THO. M'KEAN, Feby. 12, 1779.
JOHN DICKINSON, May 5th, 1779.
NICHOLAS VAN DYKE.

*On the part and behalf of the State of Maryland.*

JOHN HANSON, March 1, 1781.
DANIEL CARROLL, Mar. 1, 1781.

*On the part and behalf of the State of Virginia.*

RICHARD HENRY LEE,
JOHN BANISTER,
THOMAS ADAMS,
JNO. HARVIE,
FRANCIS LIGHTFOOT LEE.

*On the part and behalf of the State of No. Carolina.*

JOHN PENN, July 21st, 1778.
CORNS. HARNETT,
JNO. WILLIAMS.

*On the part & behalf of the State of South Carolina.*

HENRY LAURENS,
WILLIAM HENRY DRAYTON,
JNO. MATTHEWS,
RICHD. HUTSON,
THOS. HEYWARD, Junr.

*On the part & behalf of the State of Georgia.*

JNO. WALTON, 24th July, 1778.
EDWD. TELFAIR,
EDWD. LANGWORTHY.

# A DISSERTATION

ON THE

# POLITICAL UNION

AND

# CONSTITUTION

OF THE

# THIRTEEN UNITED STATES

OF

# *NORTH AMERICA,*

*which is necessary to their Preservation and Happiness; humbly offered to the Public*

*By a Citizen of Philadelphia*

PHILADELPHIA
PRINTED AND SOLD BY T. BRADFORD, IN FRONT STREET,
THREE DOORS BELOW THE COFFEE HOUSE,
MDCCLXXXIII[1]

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[1] Title-page as originally printed.

# XI

## THE EPOCH-MAKING TRACT OF PELATIAH WEBSTER, OF FEBRUARY 16, 1783, IN WHICH IS EMBODIED THE FIRST DRAFT OF THE EXISTING CONSTITUTION OF THE UNITED STATES



I. The supreme authority of any State must have power enough to effect the ends of its appointment, otherwise these ends cannot be answered, and effectually secured; at best they are precarious. But at the same time,

II. The supreme authority ought to be so limited and checked, if possible, as to prevent the abuse of power, or the exercise of powers that are not necessary to the ends of its appointment, but hurtful and oppressive to the subject; but to limit a supreme authority so far as to diminish its dignity, or lessen its power of doing good, would be to destroy or at least to corrupt it, and render it ineffectual to its ends.

III. A number of sovereign States uniting into one Commonwealth, and appointing a supreme power to manage the affairs of the Union, do necessarily and unavoidably part with and transfer over to such supreme power, so much of their own sovereignty as is necessary to render the ends of the union effectual, otherwise their confederation will be an union without bands of union, like a cask without hoops, that may and probably will fall to pieces, as soon as it is put to any exercise which requires strength.

In like manner, every member of civil society parts with many of his natural rights, that he may enjoy the rest in greater security under the protection of society.

The Union of the Thirteen States of America is of mighty consequence to the security, sovereignty, and even liberty of each of them, and of all the individuals who compose them; united under a natural, well adjusted, and effectual Constitution, they are a strong, rich, growing power, with great resources and means of defence, which no foreign power will easily attempt to invade or insult; they may easily command respect.

As their exports are mostly either raw materials or provisions, and their imports mostly finished goods, their trade becomes a capital object with every manufacturing nation of Europe, and all the southern colonies of America; their friendship and trade will of course be courted, and each power in amity with them will contribute to their security.

Their union is of great moment in another respect: they thereby form a superintending power among themselves, that can moderate and terminate disputes that may arise between different States, restrain

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intestine violence, and prevent any recourse to the dreadful decision of the sword.

I do not mean here to go into a detail of all the advantages of our union; they offer themselves on every view, and are important enough to engage every honest, prudent mind, to secure and establish that union by every possible method, that we may enjoy the full benefit of it, and be rendered happy and safe under the protection it affords.

This union, however important, cannot be supported without a Constitution founded on principles of natural truth, fitness, and utility. If there is one article wrong in such Constitution, it will discover itself in practice, by its baleful operation, and destroy or at least injure the union.

Many nations have been ruined by the errors of their political constitution. Such errors first introduce wrongs and injuries, which soon breed discontents, which gradually work up into mortal hatred and resentments; hence inveterate parties are formed, which of course make the whole community a house divided against itself, which soon falls either a prey to some enemies without, who watch to devour them, or else crumble into their original constituent parts, and lose all respectability, strength and security.

It is as physically impossible to secure to civil society, good cement of union, duration, and security without a Constitution founded on principles of natural fitness and right, as to raise timbers into a strong, compact building, which have not been framed upon true geometric principles; for if you cut one beam a foot too long or too short, not all the authority and all the force of all the carpenters can ever get it into its place, and make it fit with proper symmetry there.

As the fate then of all governments depends much upon their political constitutions, they become an object of mighty moment to the happiness and well-being of society; and as the framing of such a Constitution requires great knowledge of the rights of men and societies, as well as of the interests, circumstances, and even prejudices of the several parts of the community or commonwealth, for which it is intended; it becomes a very complex subject, and of course requires great steadiness and comprehension of thought, as well as great knowledge of men and things, to do it properly. I shall, however, attempt it with my best abilities, and hope from the candor of the public to escape censure, if I cannot merit praise.

I begin with my first and great principle, viz.: That the Constitution must vest powers in every department sufficient to secure and make effectual the ends of it. The supreme authority must have the power of making war and peace — of appointing armies and navies — of appointing officers both civil and military — of making contracts — of emitting, coining, and borrowing money — of regulating trade — of making treaties with foreign powers — of establishing post-offices — and in short of doing everything which the well-being of the Commonwealth may require, and which is not compatible to any particular State, all of which require money, and cannot possibly be made effectual without it.

They must therefore of necessity be vested with power of taxation. I know this is a most important and weighty truth, a dreadful engine of oppression, tyranny, and injury, when ill used; yet, from the necessity of the case it must be admitted.

For to give a supreme authority a power of making contracts, without any power of payment — of appointing officers civil and military, without money to pay them — a power to build ships, without any money to do it with — a power of emitting money, without any power to redeem it — or of borrowing money, without any power to make payment, etc., etc. — such solecisms in government are so nugatory and absurd that I really think to offer further argument on the subject would be to insult the understanding of my readers.

To make all these payments dependent on the votes of thirteen popular assemblies, who will undertake to judge of the propriety of every contract and every occasion of money, and grant or withhold supplies, according to their opinion, whilst at the same time the operations of the whole may be stopped by the vote of a single one of them, is absurd; for this renders all supplies so precarious and the public credit so extremely uncertain, as must in its nature render all efforts in war, and all regular administration in peace, utterly impracticable, as well as most pointedly ridiculous. Is there a man to be found who would lend money, or render personal services, or make contracts on such precarious security? Of this we have a proof of fact, the strongest of all proofs, a fatal experience, the surest tho' severest of all demonstration, which renders all other proof or argument on this subject quite unnecessary.

The present broken state of our finances — public debts and bankruptcies — enormous and ridiculous depreciation of public securities — with the total annihilation of our public credit — prove beyond all contradiction the vanity of all recourse to the particular Assemblies of the States. The recent instance of the duty of 5 per cent on imported goods, struck dead, and the bankruptcies which ensued on the single vote of Rhode Island, affords another proof of what it is certain may be done again in like circumstances.

I have another reason why a power of taxation or of raising money, ought to be vested in the supreme authority of our commonwealth, viz.: the monies necessary for the public ought to be raised by a duty imposed on imported goods, not a bare 5 per cent or any other per cent on all imported goods indiscriminately, but a duty much heavier on all articles of luxury or mere ornament, and which are consumed principally by the rich or prodigal part of the community, such as silks of all sorts, muslins, cambricks, lawns, superfine cloths, spirits, wines, etc., etc.

Such an impost would ease the husbandman, the mechanic, and the poor; would have all the practical effects of a sumptuary law; would mend the economy, and increase the industry of the community; would be collected without the shocking circumstances of collectors and their warrants; and make the quantity of tax paid always depend on the choice of the person who pays it.

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This tax can be laid by the supreme authority much more conveniently than by the particular Assemblies, and would in no case be subject to their appeals or modifications and, of course, the public credit would never be dependent on, or liable to bankruptcy by the humors of any particular Assembly. In an Essay on Finance, which I design soon to offer to the public, this subject will be treated more fully. (See my Sixth Essay on Free Trade and Finance, p. 229.)

The delegates which are to form that august body, which are to hold and exercise the supreme authority, ought to be appointed by the States in any manner they please; in which they should not be limited by any restrictions; their own dignity and the weight they will hold in the great public councils, will always depend on the abilities of the persons they appoint to represent them there; and if they are wise enough to choose men of sufficient abilities and respectable characters, men of sound sense, extensive knowledge, gravity and integrity, they will reap the honor and advantage of such wisdom.

But if they are fools enough to appoint men of trifling or vile characters, of mean abilities, faulty morals, or despicable ignorance, they must reap the fruits of such folly, and content themselves to have no weight, dignity, or esteem in the public councils; and what is more to be lamented by the Commonwealth, to do no good there.

I have no objection to the States electing and recalling their delegates as often as they please, but think it hard and very injurious both to them and the Commonwealth that they should be obliged to discontinue them after three years' service, if they find them on that trial to be men of sufficient integrity and abilities; a man of that experience is certainly much more qualified to serve in the place than a new member of equal good character can be; experience makes perfect in every kind of business — old, experienced statesmen of tried and approved integrity and abilities are a great blessing to a State — they acquire great authority and esteem as well as wisdom, and very much contribute to keep the system of government in good and salutary order; and this furnishes the strongest reason why they should be continued in the service, on Plato's great maxim that "the man best qualified to serve, ought to be appointed."

I am sorry to see a contrary maxim adopted in our American counsels; to make the highest reason that can be given for continuing a man in the public administration, assigned as a constitutional and absolute reason for turning him out, seems to me to be a solecism of a piece with many other reforms, by which we set out to surprise the world with our wisdom.

If we should adopt this maxim in the common affairs of life, it would be found inconvenient, *e. g.*, if we should make it a part of our Constitution, that a man who has served a three years' apprenticeship to the trade of a tailor or shoemaker should be obliged to discontinue that business for the three successive years, I am of opinion the country would soon be cleared of good shoemakers and tailors. Men are no more born statesmen than shoemakers or tailors. Experience is equally necessary to perfection in both.

It seems to me that a man's inducement to qualify himself for a public employment and make himself master of it must be much discouraged by this consideration, that let him take whatever pains to qualify himself in the best manner he must be shortly turned out, and, of course, it would be of more consequence to him to turn his attention to some other business which he might adopt when his present appointment should expire; and by this means the Commonwealth is in danger of losing the zeal, industry and shining abilities as well as services of their most accomplished and valuable men.

I hear that the State of Georgia has improved on this blessed principle and limited the continuance of their governors to one year; the consequence is, they have already the ghosts of departed governors stalking about in every part of their State and growing more plenty every year; and as the price of everything is reduced by its plenty I can suppose governors will soon be very low there.

This doctrine of rotation was first proposed by some sprightly geniuses of brilliant politics with this cogent reason: that by introducing a rotation in the public offices we should have a great number of men trained up to public service, but it appears to me that it will be more likely to produce many jacks at all trades, but good at none.

I think that frequent elections are a sufficient security against the continuance of men in public office whose conduct is not approved, and there can be no reason for excluding those whose conduct is approved, and who are allowed to be better qualified than any men who can be found to supply their places.

Another great object of government is the apportionment of burdens and benefits; for if a greater quota of burdens or a less quota of benefits than is just and right be allotted to any State, this ill apportionment will be an everlasting source of uneasiness and discontent. In the first case, the overburdened State will complain; in the last case, all the States whose quota of benefit is underrated will be uneasy; and this is a case of such delicacy that it cannot be safely trusted to the arbitrary opinion or judgment of any body of men however august.

Some natural principles of confessed equity, and which can be reduced to a certainty, ought, if possible, to be found and adopted; for it is of the highest moment to the Commonwealth to obviate and, if possible, wholly to take away such a fruitful and common source of infinite disputes as that of apportionment of quotas has ever proved in all States of the earth.

The value of lands may be a good rule, but the ascertainment of that value is impracticable. No assessment can be made which will not be liable to exception and debate. To adopt a good rule in anything which is impracticable is absurd, for it is physically impossible that anything should be good for practice which cannot be practised at all; but if the value of lands was capable of certain assessment, yet to adopt that value as a rule of apportionment of quotas and at the same time to except from valuation large tracts of sundry States of immense value, which have all been defended by the joint arms of the whole Empire, and

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for the defence of which no additional quota of supply is to be demanded of those States to whom such lands are secured by such joint efforts of the States, is in its nature unreasonable, and will open a door for great complaint.

It is plain without argument that such States ought either to make grants to the Commonwealth of such tracts of defended territory or sell as much of them as will pay their proper quota of defence, and pay such sums into the public treasury. And this ought to be done, let what rule of quota soever be adopted with respect to the cultivated part of the United States, for no proposition of natural right and justice can be plainer than this, that every part of valuable property which is defended, ought to contribute its quota of supply for that defence.

If then the value of cultivated lands is found to be an impracticable rule of apportionment of quotas we have to seek for some other, equally just and less exceptionable.

It appears to me that the number of living souls or human persons of whatever age, sex or condition will afford us a rule or measure of apportionment which will forever increase and decrease with the real wealth of the States, and will, of course, be a perpetual rule, not capable of corruption by any circumstances of future time, which is of vast consideration in forming a constitution which is designed for perpetual duration, and which will in its nature be as just as to the inhabited parts of each State as that of the value of lands or any other that has or can be mentioned.

Land takes its value not merely from the goodness of its soil, but from innumerable other relative advantages, among which the population of the country may be considered as principal; as lands in a full settled country will always (*cæteris paribus*) bring more than lands in thin settlements. On this principle, when the inhabitants of Russia, Poland, etc., sell real estates, they do not value them as we do by the number of acres, but by the number of people who live on them.

Where any piece of land has many advantages many people will crowd there to obtain them, which will create many competitors for the purchase of it, which will, of course, raise the price. Where there are fewer advantages there will be fewer competitors and, of course, a less price; and these two things will forever be proportionate to each other, and, of course, the one will always be a sure index of the other.

The only considerable objection I have ever heard to this is that the quality of inhabitants differs in the different States, and it is not reasonable that the black slaves in the Southern States should be estimated on a par with the white freemen in the Northern States. To discuss this question fairly, I think it will be just to estimate the neat value of the labor of both, and if it shall appear that the labor of the black person produces as much neat wealth to the Southern State as the labor of the white person does to the Northern State, I think it will follow plainly, that they are equally useful inhabitants in point of wealth, and therefore in the case before us should be estimated alike.

And if the amazing profits which the Southern planters boast of

receiving from the labor of their slaves on their plantations are real, the Southern people have greatly the advantage in this kind of estimation, and as this objection comes principally from the southward, I should suppose that the gentlemen from that part would blush to urge it any farther.

That the supreme authority should be vested with powers to terminate and finally decide controversies arising between different States, I take it, will be universally admitted, but I humbly apprehend that an appeal from the first instance of trial ought to be admitted in causes of great moment, on the same reasons that such appeals are admitted in all the States of Europe. It is well known to all men versed in courts that the first hearing of a cause rather gives an opening to that evidence and reason which ought to decide it, than such a full examination and thorough discussion, as should always precede a final judgment in causes of national consequence. A detail of reasons might be added, which I deem it unnecessary to enlarge on here.

The supreme authority ought to have a power of peace and war, and forming treaties and alliances with all foreign powers; which implies a necessity of their also having sufficient powers to enforce the obedience of all subjects of the United States to such treaties and alliances; with full powers to unite the force of the States; and direct its operations in war; and to punish all transgressors in all these respects; otherwise, by the imprudence of a few the whole Commonwealth may be embroiled with foreign powers, and the operations of war may be rendered useless or fail much of their due effect.

All these I conceive will be easily granted, especially the latter, as the power of Congress to appoint and direct the army and navy in war, with all departments thereto belonging, and punishing delinquents in them all is already admitted into practice in the course of the present unhappy war in which we have been long engaged.

II. But now the great and most difficult part of this weighty subject remains to be considered, viz., how these supreme powers are to be constituted in such manner that they may be able to exercise with full force and effect the vast authorities committed to them for the good and well-being of the United States, and yet be so checked and restrained from exercising them to the injury and ruin of the States that we may with safety trust them with a commission of such vast magnitude — and may Almighty Wisdom direct my pen in this arduous discussion.

1. The men who compose this important council must be delegated from all the States, and, of course, the hope of approbation and continuance of honors will naturally stimulate them to act rightly and to please. The dread of censure and disgrace will naturally operate as a check to restrain them from improper behavior; but, however natural and forcible these motives may be, we find by sad experience they are not always strong enough to produce the effects we expect and wish from them.

It is to be wished that none might be appointed that were not fit and adequate to this weighty business; but a little knowledge of human

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nature and a little acquaintance with the political history of mankind will soon teach us that this is not to be expected.

The representatives appointed by popular elections are commonly not only the legal, but real, substantial representatives of their electors, *i. e.*, there will commonly be about the same proportion of grave, sound, well-qualified men, trifling, desultory men — wild or knavish schemers — and dull, ignorant fools in the delegated assembly as in the body of electors.

I know of no way to help this. Such delegates must be admitted as the States are pleased to send, and all that can be done is when they get together to make the best of them.

We will suppose then they are all met in Congress, clothed with that vast authority which is necessary to the well-being and even existence of the union, that they should be vested with. How shall we empower them to do all necessary and effectual good, and restrain them from doing hurt? To do this properly I think we must recur to those natural motives of action, those feelings and apprehensions which usually occur to the mind at the very time of action; for distant consequences however weighty are often too much disregarded.

Truth loves light and is vindicated by it. Wrong shrouds itself in darkness and is supported by delusion. An honest well-qualified man loves light, can bear close examination and critical inquiry and is best pleased when he is most thoroughly understood. A man of corrupt design, or a fool of no design, hates close examination and critical inquiry. The knavery of the one and the ignorance of the other are discovered by it and they both usually grow uneasy before the investigation is half done. I do not believe that there is a more natural truth in the world than that divine one of our Saviour, "he that doeth truth, cometh to the light." I would therefore recommend that mode of deliberation which will naturally bring on the most thorough and critical discussion of the subject previous to passing any act; and for that purpose humbly propose,

2. That the Congress shall consist of two chambers, an upper and a lower house, or senate and commons, with the concurrence of both necessary to every act; and that every State send one or more delegates to each house. This will subject every act to two discussions before two distinct chambers of men equally qualified for the debate, equally masters of the subject, and of equal authority in the decision.

These two houses will be governed by the same natural motives and interests, viz., the good of the Commonwealth, and the approbation of the people. Whilst at the same time the emulation naturally arising between them will induce a very critical and sharp-sighted inspection into the motives of each other. Their different opinions will bring on conferences between the two houses in which the whole subject will be exhausted in arguments pro and con, and shame will be the portion of obstinate, convicted error.

Under these circumstances a man of ignorance or evil design will be afraid to impose on the credulity, inattention or confidence of his house

by introducing any corrupt or indigested proposition which he knows he must be called on to defend against the severe scrutiny and poignant objections of the other house. I do not believe the many hurtful and foolish legislative acts which first or last have injured all the States on earth have originated so much in corruption as indolence, ignorance, and a want of a full comprehension of the subject which a full, prying and emulous discussion would tend in a great measure to remove: this naturally rouses the lazy and idle who hate the pain of close thinking; animates the ambitious to excel in policy and argument; and excites the whole to support the dignity of their house and vindicate their own propositions.

I am not of opinion that bodies of elective men, which usually compose Parliaments, Diets, Assemblies, Congresses, etc., are commonly dishonest; but I believe it rarely happens that there are not designing men among them; and I think it would be much more difficult for them to unite their partisans in two houses, and corrupt or deceive them both, than to carry on their designs where there is but one unalarmed, unapprehensive house to be managed; and as there is no hope of making these bad men good, the best policy is to embarrass them and make their work as difficult as possible.

In these assemblies are frequently to be found sanguine men, upright enough indeed, but of strong, wild projection, whose brains are always teeming with Utopian, chimerical plans, and political whims very destructive to society. I hardly know a greater evil than to have the supreme council of a nation played off on such men's wires; such baseless visions at best end in darkness, and the dance, though easy and merry enough at first, rarely fails to plunge the credulous, simple followers into sloughs and bogs at last.

Nothing can tend more effectually to obviate these evils, and to mortify and cure such maggoty brains, than to see the absurdity of their projects exposed by the several arguments and keen satire which a full, emulous and spirited discussion of the subject will naturally produce. We have had enough of these geniuses in the short course of our politics both in our national and provincial councils, and have felt enough of their evil effects to induce us to wish for any good method to keep ourselves clear of them in future.

The consultations and decisions of national councils are so very important that the fate of millions depends on them, therefore no man ought to speak in such assemblies without considering that the fate of millions hangs on his tongue, and of course a man can have no right in such august councils to utter indigested sentiments, or indulge himself in sudden, unexamined flights of thought; his most tried and improved abilities are due to the State who have trusted him with their most important interests.

A man must therefore be most inexcusable who is either absent during such debates, or sleeps, or whispers, or catches flies during the argument, and just rouses when the vote is called to give his yea or nay to the weal or woe of a nation. Therefore it is manifestly proper that

every natural motive that can operate on his understanding or his passions to engage his attention and utmost efforts should be put in practice, and that his present feelings should be raised by every motive of honor and shame to stimulate him to every practicable degree of diligence and exertion to be as far as possible useful in the great discussion.

I appeal to the feelings of every reader, if he would not (were he in either house) be much more strongly and naturally induced to exert his utmost abilities and attention to any question which was to pass through the ordeal of a spirited discussion of another house, than he would do if the absolute decision depended on his own house without any further inquiry or challenge on the subject.

As Congress will ever be composed of men delegated by the several States, it may well be supposed that they have the confidence of their several States and understand well the policy and present condition of them. It may also be supposed that they come with strong local attachments and habits of thinking limited to the interests of their particular States. It may therefore be supposed that they will need much information in order to their gaining that enlargement of ideas and great comprehension of thought which will be necessary to enable them to think properly on that large scale which takes into view the interests of all the States.

The greatest care and wisdom is therefore requisite to give them the best and surest information, and of that kind that may be the most safely relied on to prevent their being deluded or prejudiced by partial representations made by interested men who have particular views.

This information may perhaps be best made by the great ministers of state, who ought to be men of the greatest abilities and integrity. Their business is confined to their several departments, and their attention engaged strongly and constantly to all the several parts of the same, the whole arrangement, method and order of which are formed, superintended and managed in their offices, and all information relative to their department centre there.

These ministers will of course have the best information and most perfect knowledge of the state of the nation, as far as it relates to their several departments, and will, of course, be able to give the best information to Congress in what manner any bill proposed will affect the public interest in their several departments which will nearly comprehend the whole.

The financiers manage the whole subject of revenues and expenditures, the Secretary of State takes knowledge of the general policy and internal government, the Minister of War presides in the whole business of war and defence, and the Minister of Foreign Affairs regards the whole state of the nation as it stands related to or connected with all foreign powers.

I mention a Secretary of State because all other nations have one, and I suppose we shall need one as much as they, and the multiplicity of affairs which naturally fall into his office will grow so fast that I imagine we shall soon be under the necessity of appointing one.

To these I would add Judges of Law, and Chancery; but I fear they will not be very soon appointed — the one supposes the existence of law, the other of equity — and when we shall be altogether convinced of the absolute necessity of the real and effectual existence of both of these we shall probably appoint proper heads to preside in those departments. I would therefore propose,

3. That when any bill shall pass the second reading in the house in which it originates, and before it shall be finally enacted, copies of it shall be sent to each of the said ministers of state, in being at the time, who shall give said house in writing the fullest information in their power, and their most explicit sentiments of the operation of the said bill on the public interest, as far as relates to their respective departments, which shall be received and read in said house and entered on their minutes before they finally pass the bill; and when they send the bill for concurrence to the other house they shall send therewith the said informations of the said ministers of state, which shall likewise be read in that house before their concurrence is finally passed.

I do not mean to give these great ministers of state a negative on Congress, but I mean to oblige Congress to receive their advices before they pass their bills, and that every act shall be void that is not passed with these forms; and I further propose that either house of Congress may, if they please, admit the said ministers to be present and assist in the debates of the house, but without any right of vote in the decision.

It appears to me that if every act shall pass so many different corps of discussion before it is completed, where each of them stake their characters on the advice or vote they give, there will be all the light thrown on the case which the nature and circumstances of it can admit, and any corrupt man will find it extremely difficult to foist in any erroneous clause whatever; and every ignorant or lazy man will find the strongest inducements to make himself master of the subject that he may appear with some tolerable degree of character in it; and the whole will find themselves in a manner compelled, diligently and sincerely, to seek for the real state of the facts and the natural fitness and truths arising from them, *i. e.*, the whole natural principles on which the subject depends, and which alone can endure every test, to the end that they may have not only the inward satisfaction of acting properly and usefully for the States, but also the credit and character which is or ought ever to be annexed to such a conduct.

This will give the great laws of Congress the highest probability, presumption and means of right, fitness and truth that any laws whatever can have at their first enaction, and will of course afford the highest reason for the confidence and acquiescence of the States and all their subjects in them, and being grounded in truth and natural fitness, their operations will be easy, salutary and satisfactory.

If experience shall discover error in any law (for practice will certainly discover such errors, if there be any), the legislature will always be able to correct them by such repeals, amendments, or new laws as

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shall be found necessary, but as it is much easier to prevent mischiefs than to remedy them, all possible caution, prudence and attention should be used to make the laws right at first.

4. There is another body of men among us whose business of life, and whose full and extensive intelligence, foreign and domestic, naturally make them more perfectly acquainted with the sources of our wealth, and whose particular interests are more intimately and necessarily connected with the general prosperity of the country than any other order of men in the States. I mean the merchants; and I could wish that Congress might have the benefit of that extensive and important information which this body of men are very capable of laying before them.

Trade is of such essential importance to our interests and so intimately connected with all our staples, great and small, that no sources of our wealth can flourish and operate to the general benefit of the community without it. Our husbandry, the great staple of our country, can never exceed our home consumption without this: it is plain at first sight that the farmer will not toil and sweat through the year to raise great plenty of the produce of the soil if there is no market for his produce when he has it ready for sale, *i. e.*, *if* there are no merchants to buy it.

In like manner the manufacturer will not lay out his business on any large scale if there is no merchant to buy his fabrics when he has finished them; a vent is of the most essential importance to every manufacturing country. The merchants, therefore, become the natural negotiators of the wealth of the country who take off the abundance and supply the wants of the inhabitants; and as this negotiation is the business of their lives and the source of their own wealth they, of course, become better acquainted with both our abundance and wants, and are more interested in finding and improving the best vent for the one, and supply of the other, than any other men among us, and they have a natural interest in making both the purchase and supply as convenient to their customers as possible, that they may secure their custom and thereby increase their own business.

It follows, then, that the merchants are not only qualified to give the fullest and most important information to our supreme legislature concerning the state of our trade, the abundance and wants, the wealth and poverty of our people, *i. e.*, their most important interests, but are also the most likely to do it fairly and truly, and to forward with their influence every measure which will operate to the convenience and benefits of our commerce, and oppose with their whole weight and superior knowledge of the subject any wild schemes which an ignorant or arbitrary legislature may attempt to introduce, to the hurt and embarrassment of our intercourse both with one another and with foreigners.

The States of Venice and Holland have ever been governed by merchants, or at least their policy has ever been under the great influence of that sort of men. No States have been better served, as appears by their great success, the ease and happiness of their citizens, as well as

the strength and riches of their Commonwealths. The one is the oldest, and the other the richest State in the world of equal number of people. The one has maintained sundry wars with the Grand Turk, the other has withstood the power of Spain and France; and the capitals of both have long been the principal marts of the several parts of Europe in which they are situated. And the banks of both are the best supported and in the best credit of any banks in Europe, though their countries or territories are very small and their inhabitants but a handful when compared with the great States in their neighborhood.

Merchants must from the nature of their business certainly understand the interests and resources of their country, the best of any men in it; and I know not of any one reason why they should be deemed less upright or patriotic than any other rank of citizen whatever.

I therefore humbly propose, if the merchants in the several States are disposed to send delegates from their body to meet and attend the sitting of Congress, that they shall be permitted to form a chamber of commerce, and their advice to Congress be demanded and admitted concerning all bills before Congress as far as the same may affect the trade of the States.

I have no idea that the continent is made for Congress. I take them to be no more than the upper servants of the great political body, who are to find out things by study and inquiry as other people do, and therefore I think it necessary to place them under the best possible advantages for information, and to require them to improve all those advantages, to qualify themselves in the best manner possible for the wise and useful discharge of the vast trust and mighty authority reposed in them; and as I conceive the advice of the merchants to be one of the greatest sources of mercantile information which is anywhere placed within their reach it ought by no means to be neglected, but so husbanded and improved that the greatest possible advantages may be derived from it.

Besides this I have another reason why the merchants ought to be consulted. I take it to be very plain that the husbandry and manufactures of the country must be ruined if the present rate of taxes is continued on them much longer, and, of course, a very great part of our revenue must arise from imposts on merchandise which will fall directly within the merchants' sphere of business, and of course, their concurrence and advice will be of the utmost consequence, not only to direct the properest mode of levying those duties, but also to get them carried into quiet and peaceable execution.

No men are more conversant with the citizens, or more intimately connected with their interests than the merchants, and therefore their weight and influence will have a mighty effect on the minds of the people. I do not recollect an instance in which the Court of London ever rejected the remonstrances and advices of the merchants and did not suffer severely for their pride. We have some striking instances of this in the disregarded advices and remonstrances of very many English

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merchants against the American war, and their fears and apprehensions we see verified almost like prophecies by the event.

I know not why I should continue this argument any longer, or indeed why I should have urged it so long, inasmuch as I cannot conceive that Congress or anybody else will deem it below the dignity of the supreme power to consult so important an order of men in matters of the first consequence which fall immediately under their notice, and in which their experience and, of course, their knowledge and advice are preferable to those of any other order of men.

Besides the benefits which Congress may receive from this institution, a chamber of commerce composed of members from all trading towns in the States, if properly instituted and conducted, will produce very many, I might almost say, innumerable advantages of singular utility to all the States. It will give dignity, uniformity and safety to our trade, establish the credit of the bank, secure the confidence of foreign merchants, prove in very many instances a fruitful source of improvement of our staples and mutual intercourse, correct many abuses, pacify discontents, unite us in our interests, and thereby cement the general union of the whole Commonwealth, will relieve Congress from the pain and trouble of deciding many intricate questions of trade which they do not understand by referring them over to this chamber, where they will be discussed by an order of men, the most competent to the business of any that can be found and most likely to give a decision that shall be just, useful and satisfactory.

It may be objected to all this that the less complex and the more simple every constitution is the nearer it comes to perfection. This argument would be very good and afford a very forcible conclusion if the government of men was like that of the Almighty, always founded on wisdom, knowledge and truth; but in the present imperfect state of human nature, where the best of men know but in part and must recur to advice and information for the rest, it certainly becomes necessary to form a constitution on such principles as will secure that information and advice in the best and surest manner possible.

It may be further objected that the forms herein proposed will embarrass the business of Congress and make it at best slow and dilatory. As far as this form will prevent the hurrying a bill through the house without due examination the objection itself becomes an advantage. At most these checks on the supreme authority can have no further effect than to delay or destroy a good bill, but cannot pass a bad one; and I think it much better in the main to lose a good bill than to suffer a bad one to pass into a law. Besides it is not to be supposed that clear, plain cases will meet with embarrassment, and it is most safe that untried, doubtful, difficult matters should pass through the gravest and fullest discussion before the sanction of the law is given to them.

But what is to be done if the two houses grow jealous and ill-natured, and after all their information and advice grow out of humor and insincere, and no concurrence can be obtained? I answer, sit still and do nothing until they get into a better humor. I think this is much better

than to pass laws in such a temper and spirit as the objection supposes.

It is, however, an ill compliment to so many grave personages to suppose them capable of throwing aside their reason and giving themselves up like children to the control of their passion; or, if this should happen for a moment that it should continue any length of time, is hardly to be presumed of a body of men placed in such high stations of dignity and importance, with the eyes of all the world upon them. But if they should, after all, be capable of doing this, I think it madness to set them to making laws during such fits. It is best when they are in no condition to do good to keep them from doing hurt, and if they do not grow wiser in reasonable time I know of nothing better than to be ashamed of our old appointments, and make new ones.

But what if the country is invaded, or some other exigency happens so pressing that the safety of the State requires an immediate resolution? I answer, what would you do if such a case should happen where there was but one house, unchecked, but equally divided, so that a legal vote could not be obtained. The matter is certainly equally difficult and embarrassed in both cases. But in the case proposed I know of no better way than that which the Romans adopted on the like occasion, viz., that both houses meet in one chamber and choose a dictator who should have and exercise the whole power of both houses till such time as they should be able to concur in displacing him, and that the whole power of the two houses should be suspended in the mean time.

5. I further propose that no grant of money whatever shall be made without an appropriation, and that rigid penalties (no matter how great, in my opinion the halter would be mild enough) shall be inflicted on any person, however august his station, who should give order, or vote for the payment, or actually pay one shilling of such money to any other purpose than that of its appropriation, and that no order whatever of any superior in office shall justify such payment, but every order shall express what funds it is drawn upon and what appropriation it is to be charged to, or the order shall not be paid.

This kind of embezzlement is of so fatal a nature that no measures or bounds are to be observed in curing it. When ministers will set forth the most specious and necessary occasions for money, and induce the people to pay it in full tale, and when they have gotten possession of it, to neglect the great objects for which it was given, and pay it, sometimes squander it away, for different purposes, oftentimes for useless, yea, hurtful ones, yea often even to bribe and corrupt the very officers of government, to betray their trust and contaminate the State even in its public offices — to force people to buy their own destruction and pay for it with their hard labor, the very sweat of their brow, is a crime of so high a nature that I know not any gibbet too cruel for such offenders.

6. I would further propose that the aforesaid great ministers of state shall compose a Council of State, to whose number Congress may add three others, viz., one from New England, one from the Middle States and one from the Southern States, one of which to be appointed Presid-

ent by Congress, to all of whom shall be committed the supreme executive authority of the States (all and singular of them ever accountable to Congress) who shall superintend all the executive departments and appoint all executive officers, who shall ever be accountable to and removable for just cause by them or Congress, *i. e.*, either of them.

7. I propose further that the powers of Congress, and all the other departments acting under them, shall all be restricted to such matters only of general necessity and utility to all the States as cannot come within the jurisdiction of any particular State, or to which the authority of any particular State is not competent, so that each particular State shall enjoy all sovereignty and supreme authority to all intents and purposes, excepting only those high authorities and powers by them delegated to Congress for the purposes of the general union.

There remains one very important article still to be discussed, viz., what methods the Constitution shall point out to enforce the acts and requisitions of Congress through the several States, and how the States which refuse or delay obedience to such acts and requisitions shall be treated. This, I know, is a particular of greatest delicacy, as well as of the utmost importance, and therefore, I think, ought to be decidedly settled by the Constitution in our coolest hours, whilst no passions or prejudices exist which may be excited by the great interests or strong circumstances of any particular case which may happen.

I know that supreme authorities are liable to err as well as subordinate ones. I know that courts may be in the wrong as well as the people; such is the imperfect state of human nature in all ranks and degrees of men. But we must take human nature as it is — it cannot be mended — and we are compelled both by wisdom and necessity to adopt such methods as promise the greatest attainable good, though perhaps not the greatest possible, and such as are liable to the fewest inconveniences, though not altogether free of them.

This is a question of such magnitude that I think it necessary to premise the great natural principles on which its decision ought to depend. In the present state of human nature all human life is a life of chances; it is impossible to make any interest so certain, but there will be a chance against it, and we are in all cases obliged to adopt a chance against us in order to bring ourselves within the benefit of a greater chance in our favor; and that calculation of chances which is grounded on the great natural principles of truth and fitness is of all others the most likely to come out right.

1. No laws of any State whatever, which do not carry in them a force which extends to their effectual and final execution, can afford a certain or sufficient security to the subject. This is too plain to need any proof.

2. Laws or ordinances of any kind (especially of august bodies of high dignity and consequence), which fail of execution, are much worse than none. They weaken the government, expose it to contempt, destroy the confidence of all men, natives and foreigners, in it, and expose both aggregate bodies and individuals who have placed confidence in it to

many ruinous disappointments which they would have escaped had no law or ordinance been made; therefore,

3. To appoint a Congress with powers to do all acts necessary for the support and uses of the union; and at the same time to leave all the States at liberty to obey them or not with impunity, is, in every view, the grossest absurdity, worse than a state of nature without any supreme authority at all, and at best a ridiculous effort of childish nonsense; and of course,

4. Every State in the Union is under the highest obligation to obey the supreme authority of the whole, and in the highest degree amenable to it, and subject to the highest censure for disobedience. Yet all this notwithstanding, I think the soul that sins shall die, *i. e.*, the censure of the great supreme power ought to be so directed if possible as to light on those persons who have betrayed their country and exposed it to dissolution, by opposing and rejecting that supreme authority which is the band of our union and from whence proceeds the principal strength and energy of our government.

I therefore propose that every person whatever, whether in public or private character, who shall by public vote or overt act disobey the supreme authority, shall be amenable to Congress, shall be summoned and compelled to appear before Congress and, on due conviction, suffer such fine, imprisonment, or other punishment as the supreme authority shall judge requisite.

It may be objected here that this will make a Member of Assembly accountable to Congress for his vote in Assembly. I answer, it does so in this only case, viz., when that vote is to disobey the supreme authority; no Member of Assembly can have right to give such a vote, and therefore ought to be punished for so doing. When the supreme authority is disobeyed the government must lose its energy and effect, and of course the Empire must be shaken to its very foundation.

A government which is but half executed, or whose operations may all be stopped by a single vote, is the most dangerous of all institutions. See the present Poland and ancient Greece buried in ruins in consequence of this fatal error in their policy. A government which has not energy and effect can never afford protection or security to its subjects, *i. e.*, must ever be ineffectual to its own ends.

I cannot therefore admit that the great ends of our Union should lie at the mercy of a single State, or that the energy of our government should be checked by a single disobedience, or that such disobedience should ever be sheltered from censure and punishment; the consequence is too capital, too fatal to be admitted. Even though I know very well that a supreme authority with all its dignity and importance is subject to passions like other lesser powers, that they may be and often are heated, violent, oppressive and very tyrannical, yet I know also that perfection is not to be hoped for in this life, and we must take all institutions with their natural defects or reject them altogether. I will guard against these abuses of power as far as possible, but I cannot give up all government or destroy its necessary energy for fear of these abuses.

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But to fence them out as far as possible, and to give the States as great a check on the supreme authority as can consist with its necessary energy and effect,

I propose that any State may petition Congress to repeal any law or decision which they have made, and if more than half the States do this, the law or decision shall be repealed, let its nature or importance be however great, excepting only such acts as create funds for the public credit, which shall never be repealed till their end is effected, or other funds equally effectual are substituted in their place; but Congress shall not be obliged to repeal any of these acts so petitioned against till they have time to lay the reasons of such acts before such petitioning States and to receive their answer; because such petitions may arise from sudden heats, popular prejudices, or the publication of matters false in fact, and may require time and means of cool reflection and the fullest information before the final decision is made. But if after all more than half of the States persist in their demand of a repeal, it shall take place.

The reason is, the uneasiness of a majority of States affords a strong presumption that the act is wrong, for uneasiness arises much more frequently from wrong than right. But if the act was good and right it would still be better to repeal and lose it than to force the execution of it against the opinion of a major part of the States; and lastly, if every act of Congress is subject to this repeal, Congress itself will have stronger inducement not only to examine well the several acts under their consideration, but also to communicate the reasons of them to the States than they would have if their simple vote gave the final stamp of irrevocable authority to their acts.

Further, I propose that if the execution of any act or order of the supreme authority shall be opposed by force in any of the States (which, God forbid) it shall be lawful for Congress to send into such State a sufficient force to suppress it.

On the whole, I take it that the very existence and use of our Union essentially depends on the full energy and final effect of the laws made to support it, and therefore I sacrifice all other considerations to this energy and effect, and if our Union is not worth this purchase we must give it up — the nature of the thing does not admit of any other alternative.

I do contend that our Union is worth this purchase. With it every individual rests secure under its protection against foreign or domestic insult and oppression; without it we can have no security against the oppression, insult, and invasion of foreign powers; for no single State is of importance enough to be an object of treaty with them, nor if it was, could it bear the expense of such treaties or support any character or respect in a dissevered State, but must lose all respectability among the nations abroad.

We have a very extensive trade which cannot be carried on with security and advantage without treaties of commerce and alliance with foreign nations.

We have an extensive western territory which cannot otherwise be

defended against the invasion of foreign nations bordering on our frontiers, who will cover it with their own inhabitants, and we shall lose it forever and our extent of empire be thereby restrained; and what is worse, their numerous posterity will in future time drive ours into the sea, as the Goths and Vandals formerly conquered the Romans in like circumstances, unless we have the force of the Union to repel such invasions. We have, without the Union, no security againt the inroads and wars of one State upon another, by which our wealth and strength as well as our ease and comfort will be devoured by enemies growing out of our own bowels.

I conclude then that our Union is not only one of the most essential consequence to the well-being of the States in general, but to that of every individual citizen of them, and, of course, ought to be supported and made as useful and safe as possible by a Constitution which admits that full energy and final effect of government which alone can secure its great ends and uses.

In a dissertation of this sort I would not wish to descend to minutiæ, yet there are some small matters which have important consequences and therefore ought to be noticed. It is necessary that Congress should have all usual and necessary powers of self-preservation and order, *e. g.*, to imprison for contempt, insult or interruption, etc., and to expel their own members for due causes, among which I would rank that of non-attendance on the house, or partial attendance without such excuse as shall satisfy the house.

Where there is such vast authority and trust devolved on Congress and the grand and most important interests of the Empire rest on their decisions, it appears to me highly unreasonable that we should suffer their august consultations to be suspended, or their dignity, authority and influence lessened by the idleness, neglect and non-attendance of its members; for we know that the acts of a thin house do not usually carry with them the same degree of weight and respect as those of a full house.

Besides, I think when a man is deputed a delegate in Congress and has undertaken the business, the whole Empire becomes, of course, possessed of a right to his best and constant services, which if any member refuses or neglects, the Empire is injured and ought to resent the injury, at least so far as to expel and send him home, so that his place may be better supplied.

I have one argument in favor of my whole plan, viz.: it is so formed that no men of dull intellects or small knowledge, or of habits too idle for constant attendance, or close and steady attention, can do the business with any tolerable degree of respectability, nor can they find either honor, profit or satisfaction in being there, and, of course, I could wish that the choice of the electors might never fall on such a man, or if it should, that he might have sense enough (of pain at least, if not of shame) to decline his acceptance.

For after all that can be done I do not think that a good administration depends wholly on a good Constitution and good laws, for in-

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sufficient or bad men will always make bad work and a bad administration, let the Constitution and laws be ever so good. The management of able, faithful and upright men alone can cause an administration to brighten, and the dignity and wisdom of an Empire to rise into respect; make truth the line and measure of public decision; give weight and authority to the government, and security and peace to the subject.

We now hope that we are on the close of a war of mighty effort and great distress against the greatest power on earth, whetted into the most keen resentment and savage fierceness which can be excited by wounded pride, and which usually rises higher between brother and brother offended than between strangers in contest. Twelve of the Thirteen United States have felt the actual and cruel invasions of the enemy, and eleven of our capitals have been under their power, first or last, during the dreadful conflict, but a good Providence, our own virtue and firmness, and the help of our friends have enabled us to rise superior to all the powers of our adversaries and make them seek to be at peace with us.

During the extreme pressures of the war indeed many errors in our administration have been committed when we could not have experience and time for reflection to make us wise, but these will easily be excused, forgiven and forgotten if we can now, while at leisure, find virtue, wisdom, and foresight enough to correct them and form such establishments as shall secure the great ends of our Union and give dignity, force, utility and permanency to our Empire.

It is a pity we should lose the honor and blessings which have cost us so dear for want of wisdom and firmness in measures which are essential to our preservation. It is now at our option either to fall back into our original atoms or form such an union as shall command the respect of the world and give honor and security to our people.

This vast subject lies with mighty weight on my mind, and I have bestowed on it my utmost attention and here offer the public the best thoughts and sentiments I am master of. I have confined myself in this dissertation entirely to the nature, reason and truth of my subject without once adverting to the reception it might meet with from men of different prejudices or interests. To find the truth, not to carry a point, has been my object.

I have not the vanity to imagine that my sentiments may be adopted; I shall have all the reward I wish or expect if my dissertation shall throw any light on the great subject, shall excite an emulation of inquiry and animate some abler genius to form a plan of greater perfection, less objectionable and more useful.

Philadelphia, February 16, 1783.

## NOTES: APPENDED BY PELATIAH WEBSTER TO THE REPUBLICATION MADE AT PHILADELPHIA IN 1791

### NOTE I



Forming a plan of confederation or a system of general government of the United States engrossed the attention of Congress from the Declaration of Independence, July 4, 1776, till the same was completed by Congress, July 9, 1778, and recommended to the several States for ratification, which finally took place March 1, 1781, from which time the said confederation was considered as the grand constitution of the general government, and the whole administration was conformed to it.

And as it had stood the test of discussion in Congress for two years before they completed and adopted it, and in all the States for three years more before it was finally ratified, one would have thought that it must have been a very finished and perfect plan of government.

But on trial of it in practice it was found to be extremely weak, defective, totally inefficient, and altogether inadequate to its great ends and purposes, for

1. It blended the legislative and executive powers together in one body.
2. This body, viz.: Congress, consisted of but one house, without any check upon their resolutions.
3. The powers of Congress in very few instances were definitive and final; in the most important articles of government they could do no more than recommend to the several States, the consent of every one of which was necessary to give legal sanction to any act so recommended.
4. They could assess and levy no taxes.
5. They could institute and execute no punishments except in the military department.
6. They had no power of deciding or controlling the contentions and disputes of different States with each other.
7. They could not regulate the general trade; or,
8. Even make laws to secure either public treaties with foreign States, or the persons of public ambassadors, or to punish violations or injuries done to either of them.
9. They could institute no general judiciary powers.
10. They could regulate no public roads, canals, or inland navigation, etc., etc., etc.

And what caps all the rest was that (whilst under such an inefficient political constitution the only chance we had of any tolerable administration lay wholly in the prudence and wisdom of the men who happened to take the lead in our public councils) it was fatally provided by the absurd doctrine of rotation that if any member of Congress by three years' experience and application had qualified himself to manage our public affairs with consistency and fitness, that he should be constitutionally and absolutely rendered incapable of serving any

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longer till by three years' discontinuance he had pretty well lost the cue or train of the public counsels and forgot the ideas and plans which made his service useful and important and, in the mean time, his place should be supplied by a fresh man, who had the whole matter to learn, and when he had learned it was to give place to another fresh man, and so on to the end of the chapter.

The sensible mind of the United States by long experience of the fatal mischief of anarchy, or (which is about the same thing) of this ridiculous inefficient form of government, began to apprehend that there was something wrong in our policy which ought to be redressed and mended, but nobody undertook to delineate the necessary amendments.

I was then pretty much at leisure, and was fully of opinion (though the sentiment at that time would not very well bear) that it would be ten times easier to form a new constitution than to mend the old one. I therefore sat myself down to sketch out the leading principles of that political constitution which I thought necessary to the preservation and happiness of the United States of America, which are comprised in this Dissertation.

I hope the reader will please consider that these are the original thoughts of a private individual, dictated by the nature of the subject only, long before the important theme became the great object of discussion in the most dignified and important assembly which ever sat or decided in America.

NOTE 2

At the time when this Dissertation was written (Feb. 16, 1783) the defects and insufficiency of the Old Federal Constitution were universally felt and acknowledged. It was manifest, not only that the internal police, justice, security and peace of the States could never be preserved under it, but the finances and public credit would necessarily become so embarrassed, precarious and void of support that no public movement which depended on the revenue could be managed with any effectual certainty; but though the public mind was under full conviction of all these mischiefs and was contemplating a remedy, yet the public ideas were not at all concentrated, much less arranged into any new system or form of government which would obviate these evils. Under these circumstances I offered this Dissertation to the public. How far the principles of it were adopted or rejected in the New Constitution, which was four years afterwards (Sept. 17, 1787) formed by the General Convention and since ratified by all the States, is obvious to every one.

I wish here to remark the great particulars of my plan which were rejected by the Convention.

1. My plan was to keep the legislative and executive departments entirely distinct; the one to consist of the two houses of Congress, the other to rest entirely in the Grand Council of State.

2. I proposed to introduce a Chamber of Commerce, to consist of

merchants who should be consulted by the legislature in all matters of trade and revenue, and which should have the conducting the revenue committed to them.

The first of these the Convention qualified; the second they say nothing of, *i. e.*, take no notice of it.

3. I proposed that the great officers of state should have the perusal of all bills before they were enacted into laws, and should be required to give their opinion of them as far as they affected the public interest in their several departments, which report of them Congress should cause to be read in their respective houses and entered on their minutes. This is passed over without notice.

4. I proposed that all public officers appointed by the executive authority should be amenable both to them and to the legislative power, and removable for just cause by either of them. This is qualified by the Convention.

And inasmuch as my sentiments in these respects were either qualified or totally neglected by the Convention, I suppose they were wrong. However, the whole matter is submitted to the politicians of the present age and to our posterity in future.

In sundry other things the Convention have gone into minutiæ, *e. g.*, respecting elections of presidents, senators, and representatives in Congress, etc., which I proposed to leave at large to the wisdom and discretion of Congress and of the several States.

Great reasons may doubtless be assigned for their decision, and perhaps some little ones for mine. Time, the great arbiter of all human plans may, after a while, give his decision; but neither the Convention nor myself will probably live to feel either the exultation or mortification of his approbation or disapprobation of either of our plans.

But if any of these questions should in future time become objects of discussion, neither the vast dignity of the Convention, nor the low, unnoticed state of myself, will be at all considered in the debates; the merits of the matter and the interests connected with or arising out of it will alone dictate the decision.

# XII

## THE VIRGINIA PLAN

PRESENTED TO THE FEDERAL CONVENTION, MAY 29, 1787, BY EDMUND RANDOLPH, FROM THE TEXT AS PRINTED IN THE MADISON PAPERS, II, 731–735, WITH THE THREE LETTERS OF MADISON OF MARCH AND APRIL 1787, CONTAINING THE ONLY SKETCH HE SAYS HE EVER MADE OF A CONSTITUTION



1. *Resolved*, that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, common defence, security of liberty, and general welfare.

2. *Resolved*, therefore, that the rights of suffrage in the National Legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. *Resolved*, that the National Legislature ought to consist of two branches.

4. *Resolved*, that the members of the first branch of the National Legislature ought to be elected by the people of the several States every ——— for the term of ———; to be of the age of ——— years at least; to receive liberal stipends by which they may be compensated for the devotion of their time to the public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belong to the functions of the first branch, during the term of service, and for the space of ——— after its expiration; to be incapable of re-election for the space of ——— after the expiration of their term of service, and to be subject to recall.

5. *Resolved*, that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures, to be of the age of ——— years at least; to hold their offices for a term sufficient to ensure their independency; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service; and for the space of ——— after the expiration thereof.

6. *Resolved*, that each branch ought to possess the right of originating acts; that the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate States are in-

competent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfil its duty under the Articles thereof.

7. *Resolved*, that a National Executive be instituted; to be chosen by the National Legislature for the term of ———; to receive punctually, at stated times, a fixed compensation for the services rendered, in which no increase nor diminution shall be made, so as to affect the magistracy existing at the time of increase or diminution; and to be ineligible a second time; and that, besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation.

8. *Resolved*, that the Executive, and a convenient number of the national Judiciary, ought to compose a Council of Revision, with authority to examine every act of the National Legislature, before it shall operate, and every act of a particular Legislature before a negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular Legislature be again negatived by ——— of the members of each branch.

9. *Resolved*, that a National Judiciary be established; to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature; to hold their offices during good behaviour, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the dernier ressort, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested; or which respect the collection of the national revenue; impeachments of any national officers, and questions which may involve the national peace and harmony.

10. *Resolved*, that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

11. *Resolved*, that a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State.

12. *Resolved*, that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the Articles of Union shall be adopted, and for the completion of all their engagements.

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13. *Resolved*, that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto.

14. *Resolved*, that the legislative, executive, and judiciary powers, within the several States ought to be bound by oath to support the Articles of Union.

15. *Resolved*, that the amendments which shall be offered to the Confederation, by the Convention ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several Legislatures to be expressly chosen by the people to consider and decide thereon. . . . It was then *resolved*, that the House will to-morrow resolve itself into a Committee of the Whole House, to consider of the state of the American Union; and that the propositions moved by Mr. Randolph be referred to said Committee.

## B

### THE PERSONAL CLAIM OF MADISON

In the "Introduction to the Debates in the Convention" [1] occurs the following: "As a sketch on paper, the earliest, perhaps, of a Constitutional Government for the Union (organized into regular departments, with physical means operating on individuals) to be sanctioned by the people of the States, acting in their original and sovereign character, was contained in the letters of James Madison to Thomas Jefferson of the nineteenth of March; to Governor Randolph of the eighth of April; and to General Washington of the sixteenth of April, 1787, for which see their respective dates." Thus it appears that the earliest sketch of a constitution Madison claims to have made is embodied in these three letters, printed below, written in March and April, 1787, — more than four years after the publication at Philadelphia on February 16th, 1783 (at a time when Madison was actually present in that city as a member of the Continental Congress), of Pelatiah Webster's epoch-making paper of that date.

### MADISON TO JEFFERSON

NEW YORK, March 19, 1787.

DEAR SIR, Congress have continued so thin as to be incompetent to the dispatch of the more important business before them. We have at present nine states, and it is not improbable that something may now be done. The report of Mr. Jay on the mutual violations of the treaty of peace will be among the first subjects of deliberation. He favors the British claim of interest, but refers the question to the court. The amount of the report, which is an able one, is, that the treaty should be put in force as a law, and the exposition of it left, like that of other laws, to the ordinary tribunals.

[1] *The Madison Papers*, ii, 714.

The Spanish project sleeps. A perusal of the attempt of seven states to make a new treaty, by repealing an essential condition of the old, satisfied me that Jay's caution would revolt at so irregular a sanction. A late accidental conversation with Guardoqui proved to me that the negotiation is arrested. It may appear strange that a member of Congress should be indebted to a foreign Minister for such information, yet such is the footing on which the intemperance of party has put the matter, that it rests wholly with Mr. Jay how far he will communicate with Congress, as well as how far he will negotiate with Guardoqui. But although it appears that the intended sacrifice of the Mississippi will not be made, the consequences of the intention and the attempt are likely to be very serious. I have already made known to you the light in which the subject was taken up by Virginia. Mr. Henry's disgust exceeds all measure, and I am not singular in ascribing his refusal to attend the Convention to the policy of keeping himself free to combat or espouse the result of it according to the result of the Mississippi business, among other circumstances. North Carolina also has given pointed instructions to her Delegates; so has New Jersey. A proposition for the like purpose was a few days ago made in the Legislature of Pennsylvania, but went off without a decision on its merits. Her Delegates in Congress are equally divided on the subject. The tendency of this project to foment distrust among the Atlantic States, at a crisis when harmony and confidence ought to have been studiously cherished, has not been more verified than its predicted effect on the ultramontane settlements. I have credible information that the people living on the Western waters are already in great agitation, and are taking measures for uniting their consultations. The ambition of individuals will quickly mix itself with the original motives of resentment and interest. Communication will gradually take place with their British neighbors. They will be led to set up for themselves, to seize on the vacant lands, to entice emigrants by bounties and an exemption from Federal burthens, and in all respects play the part of Vermont on a large theatre. It is hinted to me that British partizans are already feeling the pulse of some of the Western settlements. Should these apprehensions not be imaginary, Spain may have equal reason with the United States to rue the unnatural attempt to shut the Mississippi. Guardoqui has been admonished of the danger, and, I believe, is not insensible to it, though he affects to be otherwise, and talks as if the dependence of Britain on the commercial favors of his Court would induce her to play into the hands of Spain. The eye of France also cannot fail to watch over the western prospects. I learn from those who confer here with Otto and De la Forest, that they favor the opening of the Mississippi, disclaiming at the same time any authority to speak the sentiments of their Court. I find that the Virginia Delegates, during the Mississippi discussions last fall, entered into very confidential interviews with these gentlemen. In one of them the idea was communicated to Otto of opening the Mississippi for exports but not for imports, and of giving to France and Spain some exclusive privileges in the trade.

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He promised to transmit it to Vergennes, to obtain his sentiments on the whole matter, and to communicate them to the Delegates. Not long since Grayson called on him, and revived the subject. He assured Grayson that he had received no answer from France, and signified his wish that you might pump the Count de Vergennes, observing *that he would deny to you his having received any information from America.* I discover, through several channels, that it would be very grateful to the French politicians here to see our negotiations with Spain shifted into your hands and carried on under the mediating auspices of their Court.

Van Berkel has remonstrated against the late acts of Virginia, giving privileges to French wines and brandies in French bottoms, contending that the Dutch are entitled by their treaty to equal exemptions with the most favored nation, without being subject to a compensation for them. Mr. Jay has reported against this construction, but considers the act of Virginia as violating the treaty; — first, as it appears to be gratuitous, not compensatory, on the face of it; secondly, because the States have no right to form tacit compacts with foreign nations. No decision of Congress has yet taken place on the subject.

The expedition of General Lincoln against the insurgents has effectually succeeded in dispersing them. Whether the calm which he has restored will be durable or not, is uncertain. From the precautions taken by the Government of Massachusetts, it would seem as if their apprehensions were not extinguished. Besides disarming and *disfranchising*, for a limited time, those who have been in arms, as a condition of their pardon, a military corps is to be raised to the amount of one thousand or fifteen hundred Men, and to be stationed in the most suspected districts. It is said that notwithstanding these specimens of the temper of the Government, a great proportion of the offenders choose rather to risk the consequences of their treason, than submit to the conditions annexed to the amnesty; that they not only appear openly on public occasions, but distinguish themselves by badges of their character; and that this insolence is in many instances countenanced by no less decisive marks of popular favor than elections to local offices of trust and authority.

A proposition is before the Legislature of this State, now sitting, for renouncing its pretensions to Vermont, and urging the admission of it into the Confederacy. The different parties are not agreed as to the form in which the renunciation should be made, but are likely to agree as to the substance. Should the offer be made, and should Vermont not reject it altogether, I think they will insist on two stipulations at least; — first, that their becoming parties to the Confederation shall not subject their boundaries, or the rights of their citizens, to be questioned under the ninth Article; secondly, that they shall not be subject to any part of the public debts already contracted.

The Geographer and his assistants have returned surveys on the Federal lands to the amount of about eight hundred thousand acres, which it is supposed would sell pretty readily for public securities, and some of it, lying on the Ohio, even for specie. It will be difficult, how-

ever, to get proper steps taken by Congress, so many of the States having lands of their own at market. It is supposed that this consideration had some share in the zeal for shutting the Mississippi. New Jersey, and some others having no Western lands, which favored this measure, begin now to penetrate the secret. A letter from the Governor of Virginia informs me, that the project of paper-money is beginning to recover from the blow given it at the last session of the Legislature. If Mr. Henry espouses it, of which there is little doubt, I think an emission will take place.

### MADISON TO RANDOLPH

NEW YORK, April 8, 1787.

DEAR SIR,

Your two favors of the twenty-second and twenty-seventh of March, have been received since my last. In a preceding one you ask, what tribunal is to take cognizance of Clark's offence? If our own laws will not reach it, I see no possibility of punishing it. But will it not come within the act of the last session concerning treasons and *other offences* committed without the commonwealth? I have had no opportunity yet of consulting Mr. Otto on the allegation of Osler touching the marriage of French subjects in America. What is the *conspicuous prosecution* which you suspect will shortly display a notable instance of perjury?

I am glad to find that you are turning your thoughts towards the business of May next. My despair of your finding the necessary leisure as signified in one of your letters, with the probability that some leading propositions at least would be expected from Virginia had engaged me in a closer attention to the subject than I should otherwise have given. I will just hint the ideas that have occurred, leaving explanations for interview.

I think with you, that it will be well to retain as much as possible of the old Confederation, though I doubt whether it may not be best to work the valuable articles into the new system, instead of engrafting the latter on the former. I am also perfectly of your opinion, that, in framing a system, no material sacrifices ought to be made to local or temporary prejudices. An explanatory address must of necessity accompany the result of the Convention on the main object. I am not sure that it will be practicable to present the several parts of the reform in so detached a manner to the States, as that a partial adoption will be binding. Particular States may view different articles as conditions of each other, and would only ratify them as such. Others might ratify them as independent propositions. The consequence would be that the ratifications of both would go for nothing. I have not, however, examined this point thoroughly. In truth, my ideas of a reform strike so deeply at the old Confederation, and lead to such a systematic change, that they scarcely admit of the expedient.

I hold it for a fundamental point, that an individual independence of the States is utterly irreconcilable with the idea of an aggregate sovereignty. I think, at the same time, that a consolidation of the States

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into one simple republic is not less unattainable than it would be inexpedient. Let it be tried, then, whether any middle ground can be taken, which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful.

The first step to be taken is, I think, a change in the principle of representation. According to the present form of the Union an equality of suffrage, if not just towards the larger members of it, is at least safe to them, as the liberty they exercise of rejecting or executing the acts of Congress, is uncontrollable by the nominal sovereignty of Congress. Under a system which would operate without the intervention of the States, the case would be materially altered. A vote from Delaware would have the same effect as one from Massachusetts or Virginia.

Let the National Government be armed with a positive and complete authority in all cases where uniform measures are necessary, as in trade, etc., etc. Let it also retain the powers which it now possesses.

Let it have a negative, in all cases whatsoever, on the Legislative acts of the States, as the King of Great Britain heretofore had. This I conceive to be essential and the least possible abridgement of the State sovereignties. Without such a defensive power, every positive power that can be given on paper will be unavailing. It will also give internal stability to the States. There has been no moment since the peace at which the Federal assent would have been given to paper money — etc., etc.

Let this national supremacy be extended also to the Judiciary department. If the Judges in the last resort depend on the States, and are bound by their oaths to them, and not to the Union, the intention of the law and the interests of the nation may be defeated by the obsequiousness of the tribunals to the policy or prejudices of the States. It seems at least essential that an appeal should lie to some national tribunals in all cases which concern foreigners or inhabitants of other States. The admiralty jurisdiction may be fully submitted to the National Government.

A Government formed of such extensive powers ought to be well organized. The Legislative department may be divided into two branches. One of them to be chosen every —— years by the Legislatures or the people at large; the other to consist of a more select number, holding their appointments for a longer term, and going out in rotation. Perhaps the negative on the State laws may be most conveniently lodged in this branch. A council of Revision may be superadded, including the great ministerial officers.

A national Executive will also be necessary. I have scarcely ventured to form my own opinion yet, either of the manner in which it ought to be constituted, or of the authorities with which it ought to be clothed.

An article ought to be inserted expressly guaranteeing the tranquility of the States against internal as well as external dangers.

To give the new system its proper energy, it will be desirable to have it ratified by the authority of the people, and not merely by that of the Legislatures.

I am afraid you will think this project if not extravagant, absolutely unattainable and unworthy of being attempted. Conceiving it myself to go no further than is essential, the objections drawn from this source are to be laid aside. I flatter myself, however, that they may be less formidable on trial than in contemplation. The change in the principle of representation will be relished by a majority of the States, and those too of most influence. The Northern States will be reconciled to it by the *actual* superiority of their populousness; the Southern by their *expected* superiority on this point. This principle established, the repugnance of the large States to part with power will in a great degree subside, and the smaller States must ultimately yield to the predominant will. It is also already seen by many, and must by degrees be seen by all, that, unless the Union be organized efficiently on republican principles, innovations of a much more objectionable form may be obtruded; or, in the most favorable event, the partition of the Empire, into rival and hostile confederacies will ensue.

### MADISON TO WASHINGTON

NEW YORK, 16 April 1787

DEAR SIR,

I have been honored with your letter of the 31st of March, and find with much pleasure, that your views of the reform, which ought to be pursued by the convention, give a sanction to those which I have entertained. Temporizing applications will dishonor the councils, which propose them, and may foment the internal malignity of the disease, at the same time that they produce an ostensible palliation of it. Radical attempts, although unsuccessful, will at least justify the authors of them.

Having been lately led to revolve the subject, which is to undergo the discussion of the convention, and formed in my mind some outlines of a new system, I take the liberty of submitting them without apology to your eye. Conceiving that an individual independence of the States is totally irreconcilable with their aggregate sovereignty, and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.

I would propose as the ground-work, that a change be made in the principle of representation. According to the present form of the Union, in which the intervention of the States is in all great cases necessary to effectuate the measures of Congress, an equality of suffrage does not destroy the inequality of importance in the several members. No one will deny, that Virginia and Massachusetts have more weight and influence, both within and without Congress, than Delaware or Rhode Island. Under a system, which would operate in many essential points without the intervention of the State legislatures, the case would

be materially altered. A vote in the national councils from Delaware would then have the same effect and value, as one from the largest State in the Union. I am ready to believe, that such a change will not be attended with much difficulty, a majority of the States, and those of the greatest influence, will regard it as favorable to them. To the Northern States it will be recommended by their present populousness; to the Southern, by their expected advantage in this respect. The lesser States must in every event yield to the predominant will. But the consideration, which particularly urges a change in the representation, is, that it will obviate the principal objections of the larger States to the necessary concessions of power.

I would propose next, that, in addition to the present federal powers, the national government should be armed with positive and complete authority in ali cases, which require uniformity; such as the regulation of trade, including the right of taxing both exports and imports, the fixing of the terms and forms of naturalization, etc.

Over and above this positive power, a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions. Without this defensive power, every positive power, that can be given on paper, will be evaded and defeated. The States will continue to invade the national jurisdiction, to violate treaties and the law of nations, and to harass each other with rival and spiteful measures, dictated by mistaken views of interest. Another happy effect of this prerogative, would be its control over the internal vicissitudes of State policy, and the aggressions of interested majorities on the rights of minorities and of individuals. The great desideratum which has not yet been found for republican governments, seems to be some disinterested and dispassionate umpire in disputes between different passions and interests in the State. The majority, who alone have the right of decision, have frequently an interest real or supposed in abusing it. In monarchies the sovereign is more neutral to the interests and views of different parties; but unfortunately he too often forms interests of his own, repugnant to those of the whole. Might not the national prerogative here suggested be found sufficiently disinterested for the decision of local questions of policy, whilst it would itself be sufficiently restrained from the pursuit of interests adverse to those of the whole society? There has not been any moment since the peace, at which the representatives of the Union would have given an assent to paper money or any other measure of a kindred nature.

The national supremacy ought also to be extended, as I conceive, to the judiciary departments. If those, who are to expound and apply the laws, are connected by their interests and their oaths with the particular States wholly, and not with the Union, the participation of the Union in the making of the laws may be possibly rendered unavailing. It seems, at least, necessary that the oaths of the Judges should include a fidelity to the general as well as local constitution, and that an appeal

should lie to some national tribunals in all cases to which foreigners or inhabitants of other States may be parties. The admiralty jurisdiction seems to fall entirely within the purview of the national government. The national supremacy in the executive departments is liable to some difficulty, unless the officers administering them could be made appointable by the supreme government. The militia ought certainly to be placed, in some form or other, under the authority which is entrusted with the general protection and defence.

A government composed of such extensive powers should be well organized and balanced. The legislative department might be divided into two branches, one of them chosen every ——— years by the people at large, or by the legislatures; the other to consist of fewer members, to hold their places for a longer term, and to go out in such a rotation as always to leave in office a large majority of old members. Perhaps the negative on the laws might be most conveniently exercised by this branch. As a further check, a council of revision including the great ministerial officers, might be superadded.

A national executive must also be provided. I have scarcely ventured as yet to form my own opinion either of the manner in which it ought to be constituted, or of the authorities with which it ought to be clothed. An article should be inserted expressly guarantying the tranquillity of the States against internal as well as external dangers.

In like manner the right of coercion should be expressly declared. With the resources of commerce in hand, the national administration might always find means of exerting it either by sea or land. But the difficulty and awkwardness of operating by force on the collective will of a State render it particularly desirable, that the necessity of it might be precluded.

Perhaps the negative on the laws might create such a mutuality of dependence between the general and particular authorities, as to answer this purpose; or perhaps some defined objects of taxation might be submitted, along with commerce, to the general authority.

To give a new system its proper validity and energy, a ratification must be obtained from the people, and not merely from the ordinary authority of the legislatures. This will be the more essential, as inroads on the *existing constitutions* of the States will be unavoidable.

The enclosed address to the States on the subject of the treaty of peace has been agreed to by Congress, and forwarded to the several executives. We foresee the irritation, which it will excite in many of our countrymen; but could not withhold our approbation of the measure. Both the resolutions on the addresses passed without a dissenting voice.

Congress continues to be thin, and of course to do little business of importance.

The settlement of the public accounts, the disposition of the public lands, and arrangements with Spain, are subjects which claim their particular attention. As a step towards the first, the treasury board are charged with the task of reporting a plan by which the final decision on the claims of the States will be handed over from Congress to a select

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set of men, bound by the oaths, and clothed with the powers, of chancellors. As to the second article, Congress have it themselves under consideration. Between six and seven thousand acres have been surveyed, and are ready for sale. The mode of sale, however, will probably be a source of different opinions; as will the mode of disposing of the unsurveyed residue. The eastern gentlemen remain attached to the scheme of townships. Many others are equally strenuous for indiscriminate locations. The States, which have lands of their own for sale, are suspected of not being hearty in bringing the federal land to market. The business with Spain is becoming extremely delicate, and the information from the Western settlements truly alarming.

A motion was made some days ago for an adjournment of Congress for a short period, and an appointment of Philadelphia for their reassembly. The eccentricity of this place, as well with regard to east and west as to north and south, has I find been for a considerable time a thorn in the minds of many of the Southern members. Suspicion too has charged some important votes on the weight thrown by the present position of Congress into the eastern scale, and predicts that the eastern members will never concur in any substantial provision or movement for a proper permanent seat for the national government, while they remain so much gratified by its temporary residence. These seem to have been the operating motives with those on one side, who were not locally interested in the removal. On the other side, the motives are obvious.

Those of real weight were drawn from the apparent caprice with which Congress might be reproached, and particularly from the peculiarity of the existing moment. I own, that I think so much regard due to these considerations, that, notwithstanding the powerful ones on the other side, I should have assented with repugnance to the motion, and would even have voted against it, if any probability had existed, that, by waiting for a proper time, a proper measure might not be lost for a very long time. The plan, which I should have judged most eligible, would have been to fix on the removal whenever a vote could be obtained, but so as that it should not take effect until the commencement of the ensuing federal year; and, if an immediate removal had been resolved on, I had intended to propose such a change in the plan.

No final question was taken in the case; some preliminary questions showed that six States were in favor of the motion. Rhode Island, the seventh, was at first on the same side; and Mr. Varnum, one of her delegates, continues so. His colleague was overcome by the solicitations of his eastern brethren. As neither Maryland nor South Carolina was on the floor, it seems pretty evident that New York has a very precarious tenure of the advantages derived from the abode of Congress.

We understand, that the discontents in Massachusetts, which lately produced an appeal to the sword, are now producing a trial of strength in the field of electioneering. The governor will be displaced. The Senate is said to be already of a popular complexion, and it is expected the other branch will be still more so. Paper money, it is surmised, will

be the engine to be played off against creditors both public and private. As the event of the elections, however, is not yet decided, this information must be too much blended with conjecture to be regarded as a matter of certainty. I do not learn, that the proposed act relating to Vermont has yet gone through all the stages of legislation here; nor can I say whether it will finally pass or not. In truth, it having not been a subject of conversation for some time, I am unable to say what has been done, or is likely to be done with it. With the sincerest affection, and the highest esteem, I have the honor to be, dear Sir, your devoted servant.

Mr. Gaillard Hunt, in his charming *Life of James Madison*, p. 119, in speaking of the "Virginia Plan," says: "It contained the features of Madison's ideas of government, as outlined in his letters to Randolph and Washington, *but it was Randolph's hand that actually drew up the resolutions known in the Convention as 'the Virginia Plan.'*" In support of that assertion he refers to Rowland's *Life of George Mason*, ii, 101, where we find a letter written by George Mason from Philadelphia, May 20, 1787, to George Mason, Jr., saying that "the Virginia deputies (who are all here) meet and confer together two or three hours every day, in order to form a proper correspondence of sentiments; and for form's sake to see what new deputies are arrived, and to grow into some acquaintance with each other, we regularly meet every day at three o'clock." Not the slightest reference is made in the letter to Randolph or to any part taken by him in the drafting of the Virginia plan. After the most careful examination the author finds nothing to give even color to such a statement. We know that for nearly a year Madison had been specially engaged upon this work. (See "Preparation of Madison for Labors of Federal Convention," in Rives, *Life and Times of James Madison*, ii, 208.) The internal evidence is all in his favor, the style is evidently his. It is the deliberate and finished product of a careful hand that has spared no pains. There is no evidence whatever of any such preliminary labor upon the part of Randolph. There is positive evidence to the contrary in Madison's letter to Randolph of April 8, 1787, in which he says: "My despair of your finding the necessary leisure as signified in one of your letters, as to the probability that some leading propositions at least would be expected from Virginia had engaged me in a closer attention to the subject than I should otherwise have given." Randolph almost expressly disclaimed authorship of the resolutions when, in the opening words of his speech, "He expressed his regret, that it should fall to him, rather than those who were of longer standing in life and political experience, to open the great subject of their mission. But as the Convention had originated from Virginia, *and his colleagues supposed that some proposition was expected from them, they had imposed this task on him.*" There is no intimation that the task of drafting the resolutions had in any way been imposed on him. And here the very important fact should be noted that Randolph's speech is inserted entirely in Randolph's hand, *while the Virginia plan is spread upon the journal in Madison's hand.* There can be no reasonable doubt that Madison was the draftsman of the Virginia plan. It was undoubtedly his production both as to form and substance. He was in Philadelphia on February 16, 1783, at work in the Continental Congress, within a few blocks of the printing-house from which issued the epoch-making invention put forth by Pelatiah Webster on that day. After four years of study and reflection he restated, with his practiced hand, the essence of the great discovery in the Resolutions offered by Randolph in the Federal Convention on May 29, 1787.

# XIII

## THE PINCKNEY "PLAN OF A FEDERAL CONSTITUTION" PRESENTED TO THE FEDERAL CONVENTION, MAY 29, 1787, BY CHARLES PINCKNEY

(Reprinted from the copy furnished by him in 1818 to John Quincy Adams, Secretary of State. The history of that transaction has been given heretofore at page 33 *sq.* The following is a reprint from *The Madison Papers*, ii, 735–746.)



MR. CHARLES PINCKNEY laid before the House the draft of a federal government which he had prepared, to be agreed upon between the free and independent States of America:

### PLAN OF A FEDERAL CONSTITUTION

We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the government of ourselves and posterity.

### ARTICLE I

The style of this government shall be: The United States of America, and the government shall consist of supreme legislative, executive and judicial powers.

### ARTICLE II

The legislative power shall be vested in a Congress, to consist of two separate Houses; one to be called the House of Delegates; and the other the Senate, who shall meet on the ——— day of ——— in every year.

### ARTICLE III

The members of the House of Delegates shall be chosen every ——— year by the people of the several States; and the qualification of the electors shall be the same as those of the electors in the several States for their Legislatures. Each member shall have been a citizen of the United States for ——— years; and shall be of ——— years of age, and a resident in the State he is chosen for. Until a census of the people shall be taken in the manner hereinafter mentioned, the House of Delegates shall consist of ———, to be chosen from the different States in the

following proportions: for New Hampshire, ———; for Massachusetts, ———; for Rhode Island, ———; for Connecticut, ———; for New York, ———; for New Jersey, ———; for Pennsylvania, ———; for Delaware, ———; for Maryland, ———; for Virginia, ———; for North Carolina, ———; for South Carolina, ———; for Georgia, ———; and the Legislature shall hereinafter regulate the number of Delegates by the number of inhabitants, according to the provisions hereinafter made, at the rate of one for every ——— thousand. All money bills of every kind shall originate in the House of Delegates, and shall not be altered by the Senate. The House of Delegates shall exclusively possess the power of impeachment, and shall choose its own officers; and vacancies therein shall be supplied by the executive authority of the States in the representation from which they shall happen.

ARTICLE IV

The Senate shall be elected and chosen by the House of Delegates; which House, immediately after their meeting, shall choose by ballot ——— Senators from among the citizens and residents of New Hampshire; ——— from among those of Massachusetts; ——— from among those of Rhode Island; ——— from among those of Connecticut; ——— from among those of New York; ——— from among those of New Jersey; ——— from among those of Pennsylvania; ——— from among those of Delaware; ——— from among those of Maryland; ——— from among those of Virginia; ——— from among those of North Carolina; ——— from among those of South Carolina; and ——— from among those of Georgia. The Senators chosen from New Hampshire, Massachusetts, Rhode Island, and Connecticut, shall form one class; those from New York, New Jersey, Pennsylvania and Delaware, one class; and those from Maryland, Virginia, North Carolina, South Carolina and Georgia, one class. The House of Delegates shall number these classes one, two, and three; and fix the times of their service by lot. The first class shall serve for ——— years; the second for ——— years; and the third for ——— years. As their times of service expire, the House of Delegates shall fill them up by elections for ——— years; and they shall fill all vacancies that arise from death or resignation, for the time of service remaining of the members so dying or resigning. Each Senator shall be ——— years of age at least; and shall have been a citizen of the United States for four years before his election; and shall be a resident of the State he is chosen from. The Senate shall choose its own officers.

ARTICLE V

Each State shall prescribe the time and manner of holding elections by the people for the House of Delegates; and the House of Delegates shall be the judges of the elections, returns, and qualifications of their members.

In each House a majority shall constitute a quorum to do business. Freedom of speech and debate in the Legislature shall not be im-

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peached, or questioned, in any place out of it; and the members of both Houses shall in all cases, except for treason, felony, or breach of the peace, be free from arrest during their attendance on Congress, and in going to and returning from it. Both Houses shall keep Journals of their proceedings, and publish them, except on secret occasions; and the Yeas and Nays may be entered thereon at the desire of one ——— of the members present. Neither House, without the consent of the other, shall adjourn for more than ——— days, nor to any place but where they are sitting.

The members of each House shall not be eligible to, or capable of holding, any office under the Union, during the time for which they have been respectively elected; nor the members of the Senate for one year after. The members of each House shall be paid for their services by the States which they represent. Every bill which shall have passed the Legislature shall be presented to the President of the United States for his revision; if he approves it, he shall sign it; but if he does not approve it, he shall return it, with his objections, to the House it originated in; which House, if two thirds of the members present, notwithstanding the President's objections, agree to pass it, shall send it to the other House, with the President's objections; where if two thirds of the members present also agree to pass it, the same shall become a law; and all bills sent to the President, and not returned by him within ——— days, shall be laws, unless the Legislature, by their adjournment prevent their return; in which case they shall not be laws.

ARTICLE VI

The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises;

To regulate commerce with all nations, and among the several States;

To borrow money and emit bills of credit;

To establish post-offices;

To raise armies;

To build and equip fleets;

To pass laws for arming, organizing, and disciplining the militia of the United States;

To subdue a rebellion in any State, on application of its Legislature;

To coin money, and regulate the value of all coins, and to fix the standard of weights and measures;

To provide such dockyards and arsenals, and erect such fortifications as may be necessary for the United States, and to exercise exclusive jurisdiction therein;

To appoint a Treasurer, by ballot;

To constitute tribunals inferior to the Supreme Court;

To establish post and military roads;

To establish and provide for a national university at the seat of government of the United States;

To establish uniform rules of naturalization;

To provide for the establishment of a seat of government for the

United States, not exceeding ——— miles square, in which they shall have exclusive jurisdiction;

To make rules concerning captures from an enemy;

To declare the law and punishment of piracies and felonies at sea, and of counterfeiting coin, and of all offences against the laws of nations;

To call forth the aid of the militia to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;

And to make all laws for carrying the foregoing powers into execution.

The Legislature of the United States shall have the power to declare the punishment of treason, which shall consist only in levying war against the United States, or any of them, or in adhering to their enemies. No person shall be convicted of treason but by the testimony of two witnesses.

The proportion of direct taxation shall be regulated by the whole number of inhabitants of every description; which number shall, within ——— years after the first meeting of the Legislature, and within the term of every ——— year after, be taken in the manner to be prescribed by the Legislature.

No tax shall be laid on articles exported from the States; nor capitation tax but in proportion to the census before directed.

All laws regulating commerce shall require the assent of two thirds of the members present in each House. The United States shall not grant any title of nobility. The Legislature of the United States shall pass no law on the subject of religion; nor touching or abridging the liberty of the press; nor shall the privilege of the writ of Habeas Corpus ever be suspended, except in case of rebellion or invasion.

All acts made by the Legislature of the United States, pursuant to this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the land; and all judges shall be bound to consider them as such in their decisions.

### ARTICLE VII

The Senate shall have the sole and exclusive power to declare war; and to make treaties; and to appoint ambassadors and other Ministers to foreign nations; and judges of the Supreme Court.

They shall have the exclusive power to regulate the manner of deciding all disputes and controversies now existing, or which may arise, between the States, respecting jurisdiction or territory.

### ARTICLE VIII

The executive power of the United States shall be vested in a President of the United States of America, which shall be his style; and his title shall be His Excellency. He shall be elected for ——— years; and shall be re-eligible. He shall from time to time give information to the Legislature, of the state of the Union, and recommend to their consideration the measures he may think necessary. He shall take care that the laws of the United States be duly executed. He shall commission all the

officers of the United States; and, except as to ambassadors, other ministers, and judges of the Supreme Court, he shall nominate, and, with the consent of the Senate, appoint, all other officers of the United States. He shall receive public ministers from foreign nations; and may correspond with the Executives of the different States. He shall have power to grant pardons and reprieves, except in impeachments. He shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the several States; and shall receive a compensation which shall not be increased or diminished during his continuance in office. At entering on the duties of his office, he shall take an oath faithfully to execute the duties of a President of the United States. He shall be removed from his office on impeachment by the House of Delegates, and conviction in the Supreme Court of treason, bribery or corruption. In case of his removal, death, resignation or disability, the President of the Senate shall exercise the duties of his office until another President be chosen. And in case of the death of the President of the Senate, the Speaker of the House of Delegates shall do so.

### ARTICLE IX

The Legislature of the United States shall have the power, and it shall be their duty, to establish such courts of law, equity, and admiralty, as shall be necessary.

The judges of the courts shall hold their offices during good behaviour; and receive a compensation, which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court; whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment affecting ambassadors and other public ministers, this jurisdiction shall be original; and in all other cases appellate.

All criminal offences, except in cases of impeachment, shall be tried in the State where they shall be committed. The trials shall be open and public, and shall be by jury.

### ARTICLE X

Immediately after the first census of the people of the United States, the House of Delegates shall apportion the Senate by electing for each State, out of the citizens resident therein, one Senator for every ——— members each State shall have in the House of Delegates. Each State shall be entitled to have at least one member in the Senate.

### ARTICLE XI

No State shall grant letters of marque and reprisal, or enter into a treaty, or alliance, or confederation; nor grant any title of nobility; nor without the consent of the Legislature of the United States, lay any impost on imports; nor keep troops or ships of war in time of peace; nor

enter into compacts with other States or foreign powers; nor emit bills of credit; nor make anything but gold, silver, or copper, a tender in payment of debts; nor engage in war except for self-defence when actually invaded, or the danger of invasion be so great as not to admit of a delay until the Government of the United States can be informed thereof. And to render these prohibitions effectual, the Legislature of the United States shall have the power to revise the laws of the several States that may be supposed to infringe the powers exclusively delegated by this Constitution to Congress, and to negative and annul such as do.

ARTICLE XII

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Any person, charged with crimes in any State, fleeing from justice to another, shall, on demand of the Executive of the State from which he fled, be delivered up, and removed to the State having jurisdiction of the offence.

ARTICLE XIII

Full faith shall be given, in each State, to the acts of the Legislature, and to the records and judicial proceedings of the courts and magistrates, of every State.

ARTICLE XIV

The Legislature shall have power to admit new States into the Union, on the same terms with the original States; provided two thirds of the members present in both Houses agree.

ARTICLE XV

On the application of the Legislature of a State, the United States shall protect it against domestic insurrection.

ARTICLE XVI

If two thirds of the Legislatures of the States apply for the same, the Legislature of the United States shall call a convention for the purpose of amending the Constitution or, should Congress, with the consent of two thirds of each House, propose to the States amendments to the same, agreement of two thirds of the Legislatures of the States shall be sufficient to make the said amendments parts of the Constitution.

The ratification of the ——— conventions of ——— States shall be sufficient for organizing this Constitution.

Ordered that the said draft be referred to the Committee of the Whole appointed to consider the state of the American Union.

Adjourned.

# XIV

## THE ALEXANDER HAMILTON PLAN

CONSISTING OF THE ELEVEN PROPOSITIONS ACTUALLY PRESENTED BY HIM TO THE FEDERAL CONVENTION ON JUNE 18, WHICH WERE FOLLOWED BY HIS GREAT SPEECH OF FIVE HOURS, AND THE MORE ELABORATE PLAN OF A "CONSTITUTION OF GOVERNMENT BY THE PEOPLE OF THE UNITED STATES OF AMERICA," NOT FORMALLY INTRODUCED IN THE CONVENTION, BUT HANDED TOWARDS ITS CLOSE TO MADISON, WHO RETAINED A COPY OF IT

[The following is the text of the two documents, as printed in *The Works of Alexander Hamilton* (Lodge ed.), vol. i, pp. 347–369.]

### PROPOSITIONS FOR A CONSTITUTION OF GOVERNMENT



I. THE supreme legislative power of the United States of America is to be vested in two distinct bodies of men; the one to be called the Assembly, the other the Senate; who together shall form the Legislature of the United States, with power to pass all laws whatsoever, subject to the negative hereafter mentioned.

II. The Assembly to consist of persons elected by the people, to serve for three years.

III. The Senate to consist of persons elected to serve during good behaviour. Their election to be made by electors chosen for that purpose by the people. In order to this, the States to be divided into election districts. On the death, removal, or resignation of any Senator, his place to be filled out of the district from which he came.

IV. The supreme executive authority of the United States to be vested in a Governor, to be elected to serve during good behaviour. His election to be made by electors chosen by the people, in the election districts aforesaid; or by electors chosen for that purpose by the respective Legislatures — provided that if an election be not made within a limited time, the President of the Senate shall be the Governor. The Governor to have a negative upon all laws about to be passed — and (to have) the execution of all laws passed — to be the Commander-in-Chief of the land and naval forces and of the militia of the United States — to have the entire direction of war when authorized or begun — to have, with the advice and approbation of the Senate, the power of making all treaties — to have the appointment of the heads

or chief officers of the departments of finance, war, and foreign affairs — to have the nomination of all other officers (ambassadors to foreign nations included) subject to the approbation or rejection of the Senate — to have the power of pardoning all offences but treason, which he shall not pardon without the approbation of the Senate.

V. On the death, resignation, or removal of the Governor, his authorities to be exercised by the President of the Senate (until a successor be appointed).

VI. The Senate to have the sole power of declaring war — the power of advising and approving all treaties — the power of approving or rejecting all appointments of officers, except the heads or chiefs of the departments of finance, war, and foreign affairs.

VII. The Supreme judicial authority of the United States to be vested in twelve judges, to hold their offices during good behaviour, with adequate and permanent salaries. This court to have original jurisdiction in all causes of capture, and an appellate jurisdiction (from the courts of the several States) in all causes in which the revenues of the General Government or the citizens of foreign nations are concerned.

VIII. The Legislature of the United States to have power to institute courts in each State for the determination of all causes of capture, and of all matters relating to their revenues, or in which the citizens of foreign nations are concerned.

IX. The Governor, Senators, and all officers of the United States to be liable to impeachments for mal and corrupt conduct, and upon conviction to be removed from office, and disqualified for holding any place of trust or profit.

All impeachments to be tried by a court, to consist of the judges of the Supreme Court, chief or senior judge of the Superior Court of law of each State — provided that such judge hold his place during good behaviour and have a permanent salary.

X. All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void. And the better to prevent such laws being passed, the Governor or President of each State shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the State of which he is Governor or President.

XI. No State to have any forces, land or naval — and the militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them.

APPENDIX XIV

## CONSTITUTION OF GOVERNMENT BY THE PEOPLE OF THE UNITED STATES OF AMERICA

*First Draft of Hamilton, 1787*

The people of the United States of America do ordain and establish this Constitution for the government of themselves and their posterity.

### ARTICLE I

SEC. 1. The legislative power shall be vested in two distinct bodies of men, one to be called the Assembly, and the other the Senate, subject to the negative hereinafter mentioned.

SEC. 2. The executive power, with the qualifications hereinafter specified, shall be vested in a President of the United States.

SEC. 3. The supreme judicial authority, except in the cases otherwise provided for in this Constitution, shall be vested in a court, to be called the Supreme Court, to consist of not less than six nor more than twelve judges.

### ARTICLE II

SEC. 1. The Assembly shall consist of persons to be called Representatives, who shall be chosen, except in the first instance, by the free male citizens and inhabitants of the several States comprehended in the Union, all of whom, of the age of twenty-one years and upwards, shall be entitled to equal vote.

SEC. 2. But the first Assembly shall be chosen in the manner prescribed in the last Article, and shall consist of a hundred members, of whom New Hampshire shall have five, Massachusetts thirteen, Rhode Island two, Connecticut seven, New York nine, New Jersey six, Pennsylvania twelve, Delaware two, Maryland eight, Virginia sixteen, North Carolina eight, South Carolina eight, Georgia four.

SEC. 3. The Legislature shall provide for the future election of Representatives, apportioning them in each State, from time to time, as nearly as may be to the number of persons described in the 4th Section of the 7th Article, so as that the whole number of Representatives shall never be less than one hundred nor more than ——— hundred. There shall be a census taken for this purpose within three years after the first meeting of the Legislature and within every successive period of ten years. The term for which representatives shall be elected shall be determined by the Legislature, but shall not exceed three years. There shall be a general election at least once in three years, and the time of service of all the members in each Assembly shall begin (except in filling vacancies) on the same day, and shall end on the same day.

SEC. 4. Forty members shall make a House sufficient to proceed to business; but this number may be increased by the Legislature, yet so as never to exceed a majority of the whole number of Representatives.

SEC. 5. The Assembly shall choose its President and other officers, shall judge of the qualifications and election of its own members, shall punish them for improper conduct in their capacity of Representatives, not extending to life or limb, and shall exclusively possess the power of impeachment, except in the case of the President of the United States; but no impeachment of a member of the Senate shall be by less than two thirds of the Representatives present.

SEC. 6. Representatives may vote by proxy, but no Representative present shall be proxy for more than one who is absent.

SEC. 7. Bills for raising revenue, and bills for appropriating monies, for the support of fleets and armies, and for paying the salaries of the officers of the Government, shall originate in the Assembly, but may be altered and amended by the Senate.

SEC. 8. The acceptance of an office under the United States by a Representative, shall vacate his seat in the Assembly.

### ARTICLE III

SEC. 1. The Senate shall consist of persons to be chosen, except in the first instance, by electors elected for that purpose by the citizens and inhabitants of the several States comprehended in the Union, who shall have in their own right, or in the right of their wives, an estate in land for not less than life, or a term of years, whereof at the time of giving their votes there shall be at least fourteen years unexpired.

SEC. 2. But the full Senate shall be chosen in the manner prescribed in the last Article, and shall consist of forty members, to be called Senators, of whom New Hampshire shall have ———, Massachusetts ———, Rhode Island ———, Connecticut ———, New York ———, New Jersey ———, Pennsylvania ———, Delaware ———, Maryland ———, Virginia ———, North Carolina ———, South Carolina ———, Georgia ———.

SEC. 3. The Legislature shall provide for the future elections of Senators; for which purpose the States respectively, which have more than one Senator, shall be divided into convenient districts to which the Senators shall be apportioned. A State having but one Senator shall be itself a district. On the death, resignation, or removal from office of a Senator, his place shall be supplied by a new election in the district from which he came. Upon each election there shall be not less than six nor more than twelve electors chosen in a district.

SEC. 4. The number of Senators shall never be less than forty, nor shall any State, if the same shall not hereafter be divided, ever have less than the number allotted to it in the second Section of this Article; but the Legislature may increase the whole number of Senators, in the same proportion to the whole number of Representatives as forty is to one hundred, and such increase, beyond the present number, shall be apportioned to the respective States in a ratio to the respective numbers of their Representatives.

SEC. 5. If States shall be divided, or if a new arrangement of the boundaries of two or more States shall take place, the Legislature shall

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apportion the number of Senators (in elections succeeding such division or arrangement) to which the constituent parts were entitled according to the change of situation, having regard to the number of persons described in the 4th Section of the 7th Article.

SEC. 6. The Senators shall hold their places during good behaviour, removable only by conviction, on impeachment for some crime or misdemeanor. They shall continue to exercise their offices when impeached until a conviction shall take place. Sixteen Senators, attending in person, shall be sufficient to make a house to transact business; but the Legislature may increase this number, yet so as never to exceed a majority of the whole number of Senators. The Senators may vote by proxy, but no Senator who is present shall be proxy for more than two who are absent.

SEC. 7. The Senate shall choose its President and other officers, shall judge of the qualifications and elections of its members, and shall punish them for improper conduct in their capacity of Senators; but such punishment shall not extend to life or limb, nor to expulsion. In the absence of their President they may choose a temporary President. The President shall only have a casting vote when the House is equally divided.

SEC. 8. The Senate shall exclusively have the power of declaring war. No treaty shall be made without their advice and consent; which shall also be necessary to the appointment of all officers, except such for which a different provision is made in this Constitution.

ARTICLE IV

SEC. 1. The President of the United States of America (except in the first instance) shall be elected in the manner following:

The judges of the Supreme Court shall, within sixty days after a vacancy shall happen, cause public notice to be given in each State of such vacancy, appointing therein three several days for the several purposes following, to wit: a day for commencing the election of electors for the purposes thereinafter specified, to be called the first electors, which day shall be not less than forty nor more than sixty days after the day of the publication of the notice in each State; another day for the meeting of the electors, not less than forty nor more than ninety days from the day commencing their election; another day for the meeting of the electors, to be chosen by the first electors, for the purpose hereinafter specified, and to be called the second electors, which day shall be not less than forty nor more than sixty days after the day for the meeting of the first electors.

SEC. 2. After notice of a vacancy shall have been given, there shall be chosen in each State a number of persons, as the first electors in the preceding Section mentioned, equal to the whole number of the Representatives and Senators of such State in the Legislature of the United States; which electors shall be chosen by the citizens of such State having an estate of inheritance or for three lives in land, or a clear personal estate of the value of one thousand Spanish milled dollars of the present standard.

SEC. 3. These first electors shall meet in their respective States at the time appointed, at one place, and shall proceed to vote by ballot for a President who shall not be one of their own number, unless the Legislature upon experiment should hereafter direct otherwise. They shall cause two lists to be made of the name or names of the person or persons voted for, which they, or the major part of them shall sign and certify. They shall then proceed each to nominate individually, openly, in the presence of the others, two persons, as for second electors; and out of the persons who shall have the four highest numbers of nominations, they shall afterwards, by ballot, by plurality of votes, choose two who shall be the second electors, to each of whom shall be delivered one of the lists before mentioned. These second electors shall not be any of the persons voted for as President. A copy of the same list, signed & certified in like manner, shall be transmitted by the first electors, to the seat of the government of the United States, under a sealed cover, directed to the President of the Assembly, which, after the meeting of the second electors, shall be opened for the inspection of the two Houses of the Legislature.

SEC. 4. These second electors, shall meet precisely on the day appointed, and not on another day, at one place. The chief-justice of the Supreme Court, or if there be no chief-justice, the judge junior in office, in such court, or if there be no one judge junior in office, some other judge of that court, by the choice of the rest of the judges, or of a majority of them, shall attend at the same place, and shall preside at the meeting, but shall have no vote. Two thirds of the whole number of the electors shall constitute a sufficient meeting for the execution of their trust. At this meeting, the list delivered to the respective electors shall be produced and inspected, and if there be any person who has a majority of the whole number of the votes given by the first electors, he shall be the President of the United States. But if there be no such person, the second electors so met shall proceed to vote by ballot for one of the persons, named in the list, who shall have the three highest numbers of the votes of the first electors; and if upon the first or any succeeding ballot, on the day of the meeting, either of those persons shall have a number of votes equal to a majority of the whole number of second electors chosen, he shall be the President; but if no such choice be made on the day appointed for the meeting, either by reason of the non-attendance of the second electors, or their not agreeing, or any other matter, the person having the greatest number of votes of the first electors shall be the President.

SEC. 5. If it should happen that the chief-justice or some other judge of the Supreme Court should not attend in due time, the second electors shall proceed to the execution of their trust without him.

SEC. 6. If the judges should neglect to cause the notice required by the first Section of this Article to be given within the time therein limited, they may, nevertheless, cause it to be afterwards given; but their neglect, if wilful, is hereby declared to be an offence, for which they may be impeached, and if convicted they shall be punished as in other cases of conviction on impeachment.

SEC. 7. The Legislature shall, by permanent laws, provide such further regulations as may be necessary for the more orderly election of the President, not contravening the provisions herein contained.

SEC. 8. The President, before he shall enter upon the execution of his office, shall take an oath or affirmation faithfully to execute the same, and to the utmost of his judgment and power to protect the rights of the people and preserve the Constitution inviolate.

This oath or affirmation shall be administered by the President of the Senate, for the time being, in the presence of both Houses of the Legislature.

SEC. 9. The Senate and the Assembly shall always convene in session on the day appointed for the meeting of the second electors, and shall continue sitting till the President take the oath or affirmation of office. He shall hold his office during good behaviour, removable only by conviction upon an impeachment for some crime or misdemeanor.

SEC. 10. The President, at the beginning of every meeting of the Legislature, as soon as they shall be ready to proceed to business, shall convene them together at the place where the Senate shall sit, and shall communicate to them all such matters as may be necessary for their information, or as may require their consideration. He may, by message, during the session, communicate all other matters which may appear to him proper. He may, whenever in his opinion the public business shall require it, convene the Senate and Assembly, or either of them, and may prorogue them for a time, not exceeding forty days at one prorogation; and if they should disagree about their adjournment, he may adjourn them to such time as he shall think proper. He shall have a right to negative all bills, resolutions, or acts of the two Houses of the Legislature about to be passed into laws. He shall take care that the laws be faithfully executed. He shall be the Commander-in-Chief of the Army and Navy of the United States and of the Militia within the several States, and shall have the direction of war, when commenced; but he shall not take the actual command in the field of an army without the consent of the Senate and the Assembly.

All treaties, conventions, and agreements with foreign nations shall be made by him, by and with the advice and consent of the Senate. He shall have the appointment of the principal or chief officer of each of the departments of war, naval affairs, finances, and foreign affairs; and shall have the nomination, and, by and with the consent of the Senate, the appointment of all other officers to be appointed under the authority of the United States, except such for whom different provision is made by this Constitution; and provided, that this shall not be construed to prevent the Legislature from appointing by name, in their laws, persons to special and particular trusts created in such laws; nor shall be construed to prevent principals in office, merely ministerial, from constituting deputies. In the recess of the Senate he may fill vacancies in offices, by appointments, to continue in force until the end of the next session of the Senate; and he shall commission all officers. He shall have power to pardon all offences except treason, for which

he may grant reprieves until the opinion of the Senate and the Assembly can be had, and with their concurrence may pardon the same.

SEC. 11. He shall receive a fixed compensation for his services, to be paid to him at stated times, and to be increased or diminished during his continuance of office.

SEC. 12. If he depart out of the United States without the consent of the Senate & Assembly, he shall thereby abdicate his office.

SEC. 13. He may be impeached for any crime or misdemeanor by the two Houses of the Legislature, two thirds of each House concurring; and if convicted shall be removed from office. He may be afterward tried and punished in the ordinary course of law. His impeachment shall operate as a suspension from office until the determination thereof.

SEC. 14. The President of the Senate shall be Vice-President of the United States. On the death, resignation, impeachment, removal from office, or absence from the United States of the President thereof, the Vice-President shall exercise all the powers by this Constitution vested in the President, until another shall be appointed, or until he shall return within the United States, if his absence was with the consent of the Senate and Assembly.

## ARTICLE V

SEC. 1. There shall be a chief-justice of the Supreme Court, and he, with the other judges thereof, shall hold their offices during good behaviour, removable only by conviction on impeachment for some crime or misdemeanor. Each judge shall have a competent salary, to be paid to him at stated times, and not to be diminished during his continuance in office.

The Supreme Court shall have original jurisdiction in all causes in which the United States shall be a party; in all controversies between the United States and a particular State, or between two or more States, except such as relate to a claim of territory between the United States and one or more States, which shall be determined in the mode prescribed in the 6th Article; in all cases affecting foreign ministers, consuls and agents; and an appellate jurisdiction, both as to law and fact, in all cases which shall concern the citizens of different States, and in all others in which the fundamental rights of this Constitution are involved, subject to such exceptions as are herein contained, and to such regulations as the Legislature shall provide.

The judges of all courts which may be constituted by the Legislature shall also hold their places during good behaviour, removable only by conviction on impeachment for some crime or misdemeanor; and shall have competent salaries, to be paid at stated times, and not to be diminished during their continuance in office; but nothing herein contained shall be construed to prevent the Legislature from abolishing such courts themselves.

All crimes, except upon impeachment, shall be tried by a jury of twelve men; and if they shall have been committed within any State, shall be tried within such State. And all civil causes arising under this Constitution of the like kind with those which have been heretofore triable by jury in the respective States, shall in like manner be tried by jury, unless in special cases the Legislature shall think proper to make different provision, to which provision the concurrence of two thirds of both Houses shall be necessary.

Impeachments of the President and Vice-President of the United States, members of the Senate, the Governors and Presidents of the several States, the principal or chief officers of the departments enumerated in the 10th Section of the 4th Article, ambassadors, and other like public ministers, the judges of the Supreme Court, generals and admirals of the navy, shall be tried by a court to consist of the judges of the Supreme Court, and the chief-justice, or first or senior judge of the Superior Court of law in each State, of whom twelve shall constitute a court. A majority of the judges present may convict. All other persons shall be tried on impeachment, by a court to consist of the judges of the Supreme Court, and six Senators drawn by lot; a majority of whom may convict. Impeachments shall clearly specify the particular offence for which the party accused is to be tried; and judgment on conviction upon the trial thereof shall be either a removal from office singly, or removal from office and disqualification for holding any future office or place of trust. But no judgment on impeachment shall prevent prosecution and punishment in the ordinary course of law, provided that no judge concerned in such conviction shall sit as judge on the second trial. The Legislature may remove the disabilities incurred by conviction on impeachment.

### ARTICLE VI

Controversies about the right of territory between the United States and particular States shall be determined by a court to be constituted in manner following: The State or States claiming in opposition to the United States, as parties, shall nominate a number of persons equal to double the number of the judges of the Supreme Court, for the time being, of whom none shall be citizens by birth of the States which are parties, nor inhabitants thereof, when nominated, and of whom not more than two shall have their actual residence in one State. Out of the persons so nominated, the Senate shall elect one half, who, together with the judges of the Supreme Court, shall form the court. Two thirds of the whole number may hear and determine the controversy, by plurality of voices. The States concerned may, at their option, claim a decision by the Supreme Court only. All the members of the court hereby instituted shall, prior to the hearing of the cause, take an oath impartially, and according to the best of their judgments and consciences, to hear and determine the controversy.

ARTICLE VII

SEC. 1. The Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defence and safety, and to the general welfare of the Union. But no bill, resolution, or act of the Senate and Assembly shall have the force of a law until it shall have received the assent of the President, or of the Vice-President when exercising the powers of the President; and if such assent shall not have been given within ten days after such bill, resolution, or other act shall have been presented for that purpose, the same shall not be a law. No bill, resolution, or other act not assented to shall be revived in the same session of the Legislature. The mode of signifying such assent shall be by signing the bill, act or resolution, and returning it so signed to either House of the Legislature.

SEC. 2. The enacting style of all laws shall be: Be it enacted by the people of the United States of America.

SEC. 3. No bill of attainder shall be passed, nor any ex-post-facto law; nor shall any title of nobility be granted by the United States, or by either of them; nor shall any person holding an office or place of trust under the United States, without the permission of the Legislature, accept any present, emolument, office, or title from a foreign prince or state. Nor shall any religious sect or denomination, or religious test for any office or place, be ever established by law.

SEC. 4. Taxes on lands, houses, and other real estate, and capitation taxes, shall be proportioned in each State by the whole number of free persons, except Indians not taxed, and by three fifths of all other persons.

SEC. 5. The two Houses of the Legislature may by joint ballot appoint a Treasurer of the United States. Neither House (in the session of both Houses) without the consent of the other shall adjourn for more than three days at a time. The Senators & Representatives in attending, going to and coming from the session of their respective Houses shall be privileged from arrest except for crimes and breaches of the peace. The place of meeting shall always be at the seat of government, which shall be fixed by law.

SEC. 6. The laws of the United States and the treaties which have been made under the Articles of the Confederation, and which shall be made under this Constitution, shall be the supreme law of the land, and shall be so construed by the courts of the several States.

SEC. 7. The Legislature shall convene at least once in each year, which, unless otherwise provided for by law, shall be the first Monday in December.

SEC. 8. The members of the two Houses of the Legislature shall receive a reasonable compensation for their services, to be paid out of the treasury of the United States, and ascertained by law. The law for making such provision shall be passed, with the concurrence of the first Assembly, and shall extend to succeeding Assemblies; and no succeeding Assembly shall concur in an alteration of such provision so as to increase

its own compensation; but there shall be always a law in existence for making such provision.

ARTICLE VIII

SEC. 1. The Governor or President of each State shall be appointed under the authority of the United States, and shall have a right to negative all laws about to be passed in the State of which he shall be Governor or President, subject to such qualifications and regulations as the Legislature of the United States shall prescribe. He shall in other respects have the same powers only which the Constitution of the State does or shall allow its Governor or President, except as to the appointment of officers of the militia.

SEC. 2. Each Governor or President of a State shall hold his office until a successor be actually appointed, unless he die or resign or be removed from office by conviction on impeachment. There shall be no appointment of such Governor or President in the recess of the Senate.

The Governors and Presidents of the several States at the time of the ratification of this Constitution, shall continue in office in the same manner and with the same powers as if they had been appointed pursuant to the first Section of this Article.

The officers of the militia in the several States may be appointed under the authority of the United States, the Legislature whereof may authorize the Governors or Presidents of States to make such appointments, with such restrictions as they shall think proper.

ARTICLE IX

SEC. 1. No person shall be eligible to the office of President of the United States unless he be now a citizen of one of the States, or hereafter be born a citizen of the United States.

SEC. 2. No person shall be eligible as a Senator or Representative unless at the time of his election he be a citizen and inhabitant of the State in which he is chosen; provided that he shall not be deemed to be disqualified by a temporary absence from the state.

SEC. 3. No person entitled by this Constitution to elect or to be elected President of the United States, or a Senator or Representative in the Legislature thereof, shall be disqualified but by the conviction of some offence for which the law shall have previously ordained the punishment of disqualification. But the Legislature may by law provide that persons holding offices under the United States, or either of them, shall not be eligible to a place in the Assembly or Senate, and shall be, during their continuance in office, suspended from sitting in the Senate.

SEC. 4. No person having an office or place of trust under the United States shall, without permission of the Legislature, accept any present, emolument, office or title from any foreign prince or state.

SEC. 5. The citizens of each State shall be entitled to the rights, privileges, and immunities of citizens in every other State; and full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of another.

SEC. 6. Fugitives from justice from one State who shall be found in another, shall be delivered up on the application of the State from which they fled.

SEC. 7. No new State shall be erected within the limits of another, or by the junction of two or more without the concurrent consent of the Legislatures of the United States and of the States concerned. The Legislature of the United States may admit new States into the Union.

SEC. 8. The United States are hereby declared to be bound to guarantee to each State a republican form of government, and to protect each State as well against domestic violence as foreign invasion.

SEC. 9. All treaties, contracts, and engagements of the United States of America, under the Articles of Confederation and Perpetual Union, shall have equal validity under this Constitution.

SEC. 10. No State shall enter into a treaty, alliance, or contract with another, or with a foreign power without the consent of the United States.

SEC. 11. The members of the Legislature of the United States, and of each State, and all officers, executive and judicial, of the one & of the other, shall take an oath or affirmation to support the Constitution of the United States.

SEC. 12. This Constitution may receive such alterations and amendments as may be proposed by the Legislature of the United States, with the concurrence of two thirds of the members of both Houses and ratified by the Legislatures of, or by conventions of deputies chosen by the people in, two thirds of the States composing the Union.

### ARTICLE X

This Constitution shall be submitted to the consideration of Conventions in the several States, respectively, under the direction of their respective Legislatures. Each Convention which shall ratify the same, shall appoint the first Representatives and Senators from such State according to the rule prescribed in the ——— section of the ——— article. The Representatives so appointed shall continue in office for one year only. Each Convention so ratifying shall give notice thereof to the Congress of the United States, transmitting at the same time a list of the Representatives and Senators chosen. When the Constitution shall have been duly ratified, Congress shall give notice of a day and place for the meeting of the Senators and Representatives from the several States; and when these, or a majority of them, shall have assembled according to such notice, they shall by joint ballot, by plurality of votes, elect a President of the United States; and the Constitution thus organized shall be carried into effect.

# XV

## THE NEW JERSEY PLAN INTRODUCED BY PATERSON ON JUNE 15



1. *Resolved*, That the Articles of Confederation ought to be so revised, corrected and enlarged, as to render the federal Constitution adequate to the exigencies of government, and the preservation of the Union.

2. *Resolved*, That, in addition to the powers vested in the United States in Congress by the present existing Articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandises of foreign growth or manufacture, imported into any part of the United States; by stamps on paper, vellum, or parchment; and by a postage on all letters or packages passing through the general post-office; — to be applied to such federal purposes as they shall deem proper and expedient: to make rules and regulations for the collection thereof; and the same, from time to time, to alter and amend in such manner as they shall think proper: to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other; — provided that all punishments, fines, forfeitures, and penalties, to be incurred for contravening such acts, rules, and regulations, shall be adjudged by the common-law judiciaries of the state in which any offence contrary to the true intent and meaning of such acts, rules, and regulations, shall have been committed or perpetrated, with liberty of commencing in the first instance all suits and prosecutions for that purpose in the superior common-law judiciary in such state; subject, nevertheless, for the correction of all errors, both in law and fact, in rendering judgment, to an appeal to the judiciary of the United States

3. *Resolved*, That whenever requisitions shall be necessary, instead of the rule for making requisitions mentioned in the Articles of Confederation, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that, if such requisitions be not complied with in the time specified therein, to direct the collection thereof in the non-complying states, and for that purpose to devise and pass acts directing and authorizing the same; — provided, that none of the powers hereby vested in the United States in Congress shall be exercised without the consent of at least ——— states; and in that proportion, if the number of confederated states should hereafter be increased or diminished.

4. *Resolved*, That the United States in Congress be authorized to elect a federal executive, to consist of ——— persons; to continue in office for the term of ——— years; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons composing the executive at the time of such increase or diminution; to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service, and for ——— years thereafter; to be ineligible a second time, and removable by Congress, on application by a majority of the executives of the several states: that the executive, besides their general authority to execute the federal acts, ought to appoint all federal officers not otherwise provided for, and to direct all military operations; — provided, that none of the persons composing the federal executive shall, on any occasion, take command of any troops, so as personally to conduct any military enterprise, as general, or in any other capacity.

5. *Resolved*, That a federal judiciary be established, to consist of a supreme tribunal, the judges of which to be appointed by the executive, and to hold their offices during good behaviour; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary so established shall have authority to hear and determine, in the first instance, on all impeachments of federal officers, and, by way of appeal, in the dernier ressort, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of the federal revenue: that none of the judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for ——— thereafter.

6. *Resolved*, That all acts of the United States in Congress, made by virtue and in pursuance of the powers hereby, and by the Articles of Confederation, vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, so far forth as those acts or treaties shall relate to the said states or their citizens; and that the judiciary of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding; and that if any state, or any body of men in any state, shall oppose or prevent the carrying into execution such acts or treaties, the federal executive shall be authorized to call forth the power of the confederated states, or so much thereof as may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties.

7. *Resolved*, That provision be made for the admission of new states into the Union.

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8. *Resolved*, That the rule for naturalization ought to be the same in every state.

9. *Resolved*, That a citizen of one state, committing an offence in another state of the Union, shall be deemed guilty of the same offence as if it had been committed by a citizen of the state in which the offence was committed.

# XVI

## THE TWENTY-THREE RESOLUTIONS REFERRED TO THE COMMITTEE OF DETAIL JULY 26



1. *Resolved*, That the government of the United States ought to consist of a supreme legislative, judiciary, and executive.

2. *Resolved*, That the legislature consist of two branches.

3. *Resolved*, That the members of the first branch of the legislature ought to be elected by the people of the several states for the term of two years; to be paid out of the public treasury; to receive an adequate compensation for their services; to be of the age of twenty-five years at least; to be ineligible to, and incapable of holding, any office under the authority of the United States (except those peculiarly belonging to the functions of the first branch) during the term of service of the first branch.

4. *Resolved*, That the members of the second branch of the legislature of the United States ought to be chosen by the individual legislatures; to be of the age of thirty years at least; to hold their offices for six years, one third to go out biennially; to receive a compensation for the devotion of their time to the public service; to be ineligible to, and incapable of holding, any office under the authority of the United States (except those peculiarly belonging to the functions of the second branch) during the term for which they are elected, and for one year thereafter.

5. *Resolved*, That each branch ought to possess the right of originating acts.

6. *Resolved*, That the national legislature ought to possess the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

7. *Resolved*, That the legislative acts of the United States, made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states, or their citizens and inhabitants; and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding.

8. *Resolved*, That, in the general formation of the legislature of the United States, the first branch thereof shall consist of sixty-five members; of which number,

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New Hampshire shall send 3; Massachusetts, 8; Rhode Island, 1; Connecticut, 5; New York, 6; New Jersey, 4; Pennsylvania, 8; Delaware, 1; Maryland, 6; Virginia, 10; North Carolina, 5; South Carolina, 5; Georgia, 3.

But, as the present situation of the states may probably alter in the number of their inhabitants, the legislature of the United States shall be authorized, from time to time, to apportion the number of representatives; and in case any of the states shall hereafter be divided, or enlarged by addition of territory, or any two or more states united, or any new states created within the limits of the United States, the legislature of the United States shall possess authority to regulate the number of representatives, in any of the foregoing cases, upon the principle of their number of inhabitants, according to the provisions hereafter mentioned, namely — Provided always, that representation ought to be proportioned to direct taxation. And, in order to ascertain the alteration in the direct taxation which may be required from time to time, by the changes in the relative circumstances of the states, —

9. *Resolved*, That a census be taken within six years from the first meeting of the legislature of the United States, and once within the term of every ten years afterwards, of all the inhabitants of the United States, in the manner and according to the ratio recommended by Congress in their resolution of the 18th of April, 1783; and that the legislature of the United States shall proportion the direct taxation accordingly.

10. *Resolved*, That all bills for raising or appropriating money, and for fixing the salaries of the officers of the government of the United States, shall originate in the first branch of the legislature of the United States, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury but in pursuance of appropriations to be originated by the first branch.

11. *Resolved*, That, in the second branch of the legislature of the United States, each state shall have an equal vote.

12. *Resolved*, That a national executive be instituted, to consist of a single person; to be chosen by the national legislature for the term of seven years; to be ineligible a second time; with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for; to be removable on impeachment, and conviction of malpractice or neglect of duty; to receive a fixed compensation for the devotion of his time to the public service, to be paid out of the public treasury.

13. *Resolved*, That the national executive shall have a right to negative any legislative act; which shall not be afterwards passed, unless by two thirds part of each branch of the national legislature.

14. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature; to hold their offices during good behaviour; to receive punctually, at stated times, a fixed compensation for their services, in which no diminution shall be made so as to affect the persons actually in office at the time of such diminution.

15. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.

16. *Resolved*, That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony.

17. *Resolved*, That provision ought to be made for the admission of states lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.

18. *Resolved*, That a republican form of government shall be guaranteed to each state; and that each state shall be protected against foreign and domestic violence.

19. *Resolved*, That provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary.

20. *Resolved*, That the legislative, executive, and judiciary powers, within the several states, and of the national government, ought to be bound, by oath, to support the Articles of Union.

21. *Resolved*, That the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly, or assemblies, of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon.

22. *Resolved*, That the representation in the second branch of the legislature of the United States shall consist of two members from each state, who shall vote *per capita*.

23. *Resolved*, That it be an instruction to the committee to whom were referred the proceedings of the Convention for the establishment of a national government, to receive a clause, or clauses, requiring certain qualifications of property and citizenship in the United States for the executive, the judiciary, and the members of both branches of the legislature of the United States.[1]

[1] With the above Resolutions were referred the propositions offered by Mr. C. Pinckney on the 29th of May, and by Mr. Paterson on the 15th of June.

# XVII

## DRAFT OF CONSTITUTION REPORTED BY THE COMMITTEE OF DETAIL ON AUGUST 6

Appendix XVII

We, the people of the states of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish, the following Constitution for the government of ourselves and our posterity: —

Article I. The style of the government shall be, "The United States of America."

Art. II. The government shall consist of supreme legislative, executive, and judicial powers.

Art. III. The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall in all cases have a negative on the other. The legislature shall meet on the first Monday in December in every year.

Art. IV, Sect. 1. The members of the House of Representatives shall be chosen, every second year, by the people of the several states comprehended within this Union. The qualifications of the electors shall be the same, from time to time, as those of the electors, in the several states, of the most numerous branch of their own legislatures.

Sect. 2. Every member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen in the United States for at least three years before his election; and shall be, at the time of his election, a resident of the state in which he shall be chosen.

Sect. 3. The House of Representatives shall, at its first formation, and until the number of citizens and inhabitants shall be taken in the manner hereinafter described, consist of sixty-five members, of whom three shall be chosen in New Hampshire, eight in Massachusetts, one in Rhode Island and Providence Plantations, five in Connecticut, six in New York, four in New Jersey, eight in Pennsylvania, one in Delaware, six in Maryland, ten in Virginia, five in North Carolina, five in South Carolina, and three in Georgia.

Sect. 4. As the proportions of numbers in different states will alter from time to time; as some of the states may hereafter be divided; as others may be enlarged by addition of territory; as two or more states may be united; as new states will be erected within the limits of the United States, — the legislature shall, in each of these cases, regulate

the number of representatives by the number of inhabitants, according to the provisions hereinafter made, at the rate of one for every forty thousand.

SECT. 5. All bills for raising or appropriating money, and for fixing the salaries of the officers of government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate. No money shall be drawn from the public treasury but in pursuance of appropriations that shall originate in the House of Representatives.

SECT. 6. The House of Representatives shall have the sole power of impeachment. It shall choose its Speaker and other officers.

SECT. 7. Vacancies in the House of Representatives shall be supplied by writs of election from the executive authority of the state in the representation from which they shall happen.

ART. V, SECT. 1. The Senate of the United States shall be chosen by the legislatures of the several states. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote.

SECT. 2. The senators shall be chosen for six years; but immediately after the first election, they shall be divided, by lot, into three classes, as nearly as may be, numbered one, two, and three. The seats of the members of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; of the third class at the expiration of the sixth year; so that a third part of the members may be chosen every second year.

SECT. 3. Every member of the Senate shall be of the age of thirty years at least; shall have been a citizen in the United States for at least four years before his election; and shall be, at the time of his election, a resident of the state for which he shall be chosen.

SECT. 4. The Senate shall choose its own President and other officers.

ART. VI, SECT. 1. The times, and places, and manner, of holding the elections of the members of each House, shall be prescribed by the legislature of each state; but their provisions concerning them may, at any time, be altered by the legislature of the United States.

SECT. 2. The legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said legislature shall seem expedient.

SECT. 3. In each House a majority of the members shall constitute a quorum to do business; but a smaller number may adjourn from day to day.

SECT. 4. Each House shall be the judge of the elections, returns, and qualifications, of its own members.

SECT. 5. Freedom of speech and debate in the legislature shall not be impeached or questioned in any court or place out of the legislature; and the members of each House shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at Congress, and in going to and returning from it.

SECT. 6. Each House may determine the rules of its proceedings;

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may punish its members for disorderly behaviour; and may expel a member.

SECT. 7. The House of Representatives, and the Senate when it shall be acting in a legislative capacity, shall keep a journal of their proceedings; and shall, from time to time, publish them; and the yeas and nays of the members of each House, on any question, shall, at the desire of one fifth part of the members present, be entered on the Journal.

SECT. 8. Neither House, without the consent of the other, shall adjourn for more than three days, nor to any other place than that at which the two Houses are sitting. But this regulation shall not extend to the Senate when it shall exercise the powers mentioned in the ——— Article.

SECT. 9. The members of each House shall be ineligible to, and incapable of holding, any office under the authority of the United States, during the time for which they shall respectively be elected; and the members of the Senate shall be ineligible to, and incapable of holding, any such office for one year afterwards.

SECT. 10. The members of each House shall receive a compensation for their services, to be ascertained and paid by the state in which they shall be chosen.

SECT. 11. The enacting style of the laws of the United States shall be, "Be it enacted, and it is hereby enacted, by the House of Representatives, and by the Senate, of the United States, in Congress assembled."

SECT. 12. Each House shall possess the right of originating bills, except in the cases before mentioned.

SECT. 13. Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States for his revision. If, upon such revision, he approve of it, he shall signify his approbation by signing it. But if, upon such revision, it shall appear to him improper for being passed into a law, he shall return it, together with his objections against it, to that House in which it shall have originated; who shall enter the objections at large on their Journal, and proceed to reconsider the bill. But if, after such reconsideration, two thirds of that House shall, notwithstanding the objections of the President, agree to pass it, it shall, together with his objections, be sent to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of the other House also, it shall become a law. But, in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the persons voting for or against the bill shall be entered on the Journal of each House respectively. If any bill shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the legislature, by their adjournment, prevent its return, in which case it shall not be a law.

ART. VII, SECT. 1. The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises;

To regulate commerce with foreign nations, and among the several states;

To establish an uniform rule of naturalization throughout the United States;

To coin money;

To regulate the value of foreign coins;

To fix the standard of weights and measures;

To establish post-offices;

To borrow money, and emit bills, on the credit of the United States;

To appoint a treasurer by ballot;

To constitute tribunals inferior to the supreme court;

To make rules concerning captures on land and water;

To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations;

To subdue a rebellion in any state, on the application of its legislature;

To make war;

To raise armies;

To build and equip fleets;

To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;

And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECT. 2. Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted.

SECT. 3. The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes;) which number shall, within six years after the first meeting of the legislature, and within the term of every ten years afterwards, be taken in such a manner as the said legislature shall direct.

SECT. 4. No tax or duty shall be laid by the legislature on articles exported from any state; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited.

SECT. 5. No capitation tax shall be laid, unless in proportion to the census hereinbefore directed to be taken.

SECT. 6. No navigation act shall be passed without the assent of two thirds of the members present in each House.

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SECT. 7. The United States shall not grant any title of nobility.

ART. VIII. The acts of the legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges in the several states shall be bound thereby in their decisions, anything in the constitutions or laws of the several states to the contrary notwithstanding.

ART. IX, SECT. 1. The Senate of the United States shall have power to make treaties, and to appoint ambassadors, and judges of the supreme court.

SECT. 2. In all disputes and controversies now subsisting, or that may hereafter subsist, between two or more states, respecting jurisdiction or territory, the Senate shall possess the following powers: — Whenever the legislature, or the executive authority, or lawful agent of any state, in controversy with another, shall, by memorial to the Senate, state the matter in question, and apply for a hearing, notice of such memorial and application shall be given, by order of the Senate, to the legislature, or the executive authority, of the other state in controversy. The Senate shall also assign a day for the appearance of the parties, by their agents, before that House. The agents shall be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question. But if the agents cannot agree, the Senate shall name three persons out of each of the several states; and from the list of such persons, each party shall alternately strike out one, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine, names, as the Senate shall direct, shall, in their presence, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy; provided a majority of the judges who shall hear the cause agree in the determination. If either party shall neglect to attend at the day assigned, without showing sufficient reasons for not attending, or being present shall refuse to strike, the Senate shall proceed to nominate three persons out of each state, and the clerk of the Senate shall strike in behalf of the party absent or refusing. If any of the parties shall refuse to submit to the authority of such court, or shall not appear to prosecute or defend their claim or cause, the court shall nevertheless proceed to pronounce judgment. The judgment shall be final and conclusive. The proceedings shall be transmitted to the President of the Senate, and shall be lodged among the public records, for the security of the parties concerned. Every commissioner shall, before he sit in judgment, take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection, or hope of reward."

SECT. 3. All controversies concerning lands claimed under different grants of two or more states, whose jurisdictions, as they respect such

lands, shall have been decided or adjusted subsequently to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different states.

ART. X, SECT. 1. The executive power of the United States shall be vested in a single person. His style shall be, "The President of the United States of America," and his title shall be, "His Excellency." He shall be elected by ballot by the legislature. He shall hold his office during the term of seven years; but shall not be elected a second time.

SECT. 2. He shall, from time to time, give information to the legislature of the state of the Union. He may recommend to their consideration such measures as he shall judge necessary and expedient. He may convene them on extraordinary occasions. In case of disagreement between the two Houses, with regard to the time of adjournment, he may adjourn them to such time as he thinks proper. He shall take care that the laws of the United States be duly and faithfully executed. He shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution. He shall receive ambassadors, and may correspond with the supreme executives of the several states. He shall have power to grant reprieves and pardons, but his pardon shall not be pleadable in bar of an impeachment. He shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states. He shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during his continuance in office. Before he shall enter on the duties of his department, he shall take the following oath or affirmation, "I ——— solemnly swear (or affirm) that I will faithfully execute the office of President of the United States of America." He shall be removed from his office on impeachment by the House of Representatives, and conviction, in the supreme court, of treason, bribery, or corruption. In case of his removal, as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties until another President of the United States be chosen, or until the disability of the President be removed.

ART. XI, SECT. 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States.

SECT. 2. The judges of the supreme court, and of the inferior courts, shall hold their offices during good behaviour. They shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECT. 3. The jurisdiction of the supreme court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers, and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two

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or more states, (except such as shall regard territory or jurisdiction;) between a state and citizens of another state; between citizens of different states; and between a state or the citizens thereof, and foreign states, citizens or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions, and under such regulations, as the legislature shall make. The legislature may assign any part of the jurisdiction above mentioned, (except the trial of the President of the United States,) in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time.

SECT. 4. The trial of all criminal offences (except in cases of impeachment) shall be in the state where they shall be committed; and shall be by jury.

SECT. 5. Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit, under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

ART. XII. No state shall coin money; nor grant letters of marque and reprisal; nor enter into any treaty, alliance, or confederation; nor grant any title of nobility.

ART. XIII. No state, without the consent of the legislature of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts; nor lay imposts or duties on imports; nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another state, or with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent as not to admit of a delay until the legislature of the United States can be consulted.

ART. XIV. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

ART. XV. Any person charged with treason, felony, or high misdemeanor in any state, who shall flee from justice, and shall be found in any other state, shall, on demand of the executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of the offence.

ART. XVI. Full faith shall be given in each state to the acts of the legislatures, and to the records and judicial proceedings of the courts and magistrates of every other state.

ART. XVII. New states lawfully constituted or established within the limits of the United States may be admitted, by the legislature, into this government; but to such admission the consent of two thirds of the members present in each House shall be necessary. If a new state shall arise within the limits of any of the present states, the consent of the legislatures of such states shall be also necessary to its admission. If the admission be consented to, the new states shall be admitted on

the same terms with the original states. But the legislature may make conditions with the new states concerning the public debt which shall be then subsisting.

ART. XVIII. The United States shall guaranty to each state a republican form of government; and shall protect each state against foreign invasions, and, on the application of its legislature, against domestic violence.

ART. XIX. On the application of the legislatures of two thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.

ART. XX. The members of the legislatures, and the executive and judicial officers of the United States, and of the several states, shall be bound by oath to support this Constitution.

ART. XXI. The ratification of the conventions of ——— states shall be sufficient for organizing this Constitution.

ART. XXII. This Constitution shall be laid before the United States in Congress assembled, for their approbation; and it is the opinion of this Convention, that it should be afterwards submitted to a convention chosen in each state, under the recommendation of its legislature, in order to receive the ratification of such convention.

ART. XXIII. To introduce this government, it is the opinion of this Convention, that each assenting convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the conventions of ——— states, should appoint and publish a day, as early as may be, and appoint a place, for commencing proceedings under this Constitution; that, after such publication, the legislatures of the several states should elect members of the Senate and direct the election of members of the House of Representatives; and that the members of the legislature should meet at the time and place assigned by Congress, and should, as soon as may be after their meeting, choose the President of the United States, and proceed to execute this Constitution.

# XVIII

## THE CONSTITUTION AS REPORTED BY THE COMMITTEE ON STYLE ON SEPTEMBER 12



WE, the people of the United States, in order to form a more perfect union, to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ART. I, SECT. 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECT. 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every forty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers; and they shall have the sole power of impeachment.

SECT. 3. The Senate of the United States shall be composed of

two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; and of the third class at the expiration of the sixth year; so that one third may be chosen every second year. And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The Vice-President of the United States shall be, *ex officio*, President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of the President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two thirds of the members present.

Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECT. 4. The times, places, and manner, of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations.

The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECT. 5. Each house shall be the judge of the elections, returns, and qualifications, of its own members; and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

Each house may determine the rules of its proceedings; punish its members for disorderly behaviour; and, with the concurrence of two thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment,

require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the Journal.

Neither house, during the session of Congress, shall, without consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECT. 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office, under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECT. 7. The enacting style of the laws shall be, "Be it enacted by the Senators and Representatives, in Congress assembled."

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States. If he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If, after such reconsideration, two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be decided by yeas and nays; and the names of the persons voting for and against the bill shall be entered on the Journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by its adjournment, prevent its return; in which case it shall not be a law.

Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary, (except on the question of adjournment,) shall be presented to the President of the United States, and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by three fourths of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECT. 8. The Congress may, by joint ballot, appoint a treasurer.

They shall have power to lay and collect taxes, duties, imposts, and excises;

To pay the debts, and provide for the common defence and general welfare, of the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, — but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for the calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the [service of the] United States — reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress;

To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and,

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECT. 9. The migration or importation of such persons as the several states, now existing, shall think proper to admit, shall not be prohibited

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by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder shall be passed, or any *ex post facto* law.

No capitation tax shall be laid, unless in proportion to the census hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No money shall be drawn from the treasury, but in consequence of appropriations made by law.

No title of nobility shall be granted by the United States.

And no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SECT. 10. No state shall coin money, nor emit bills of credit, nor make anything but gold and silver coin a tender in payment of debts, nor pass any bill of attainder, nor *ex post facto* laws, nor laws altering or impairing the obligation of contracts; nor grant letters of marque and reprisal; nor enter into any treaty, alliance, or confederation; nor grant any title of nobility.

No state shall, without the consent of Congress, lay imposts or duties on imports or exports, nor with such consent, but to the use of the treasury of the United States; nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another state, nor with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent as not to admit of delay until the Congress can be consulted.

ART. II, SECT. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected in the following manner: —

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in Congress; but no senator or representative shall be appointed an elector, nor any person holding an office of trust or profit under the United States.

The electors shall meet in their respective states, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the general government, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates; and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such

number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall, in like manner, choose the President. But in choosing the President, the votes shall be taken by states, and not *per capita*, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two thirds of the states; and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President by the representatives, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.

The Congress may determine the time of choosing the electors, and the time in which they shall give their votes; but the election shall be on the same day throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed, or the period for choosing another President arrive.

The President shall, at stated times, receive a fixed compensation for his services, which shall neither be increased nor diminished during the period for which he shall have been elected.

Before he enter on the execution of his office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my judgment and power, preserve, protect, and defend the Constitution of the United States."

SECT. 2. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States.

He may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices. And he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present con-

cur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of the next session.

SECT. 3. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

SECT. 4. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ART. III, SECT. 1. The judicial power of the United States, both in law and equity, shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECT. 2. The judicial power shall extend to all cases, both in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; or between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In cases affecting ambassadors, other public ministers, and consuls, and in those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, — with such exceptions, and under such regulations, as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

SECT. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted.

ART. IV, SECT. 1. Full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings, of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof.

SECT. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, and removed to the state having jurisdiction of the crime.

No person legally held to service or labour in one state, escaping into another, shall, in consequence of regulations subsisting therein, be discharged from such service or labour, but shall be delivered up, on claim of the party to whom such service or labour may be due.

SECT. 3. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States, or of any particular state.

SECT. 4. The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature or executive, against domestic violence.

ART. V. The Congress, whenever two thirds of both houses shall deem necessary, or on the application of two thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three fourths, at least, of the legislatures of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the ——— and ——— Sections of Article ———.

ART. VI. All debts contracted, and engagements entered into, before

the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office of public trust under the United States.

ART. VII. The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

In a "letter" accompanying their Report, the Committee on Style say: "In our deliberations on this subject, we kept steadily in our view that which appeared to us the greatest interest of every true American, the consolidation of our union, in which is involved our property, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid in points of inferior magnitude, than might have been otherwise expected. And thus the Constitution which we now present is the result of a spirit of amity and of that mutual deference and concession, which the peculiarity of our political situation rendered indispensable." *Madison Papers*, iii, 1561.

# XIX

## PELATIAH WEBSTER'S DEFENCE

### OF THE NEW CONSTITUTION, PUBLISHED OCTOBER 12, 1787, IN REPLY TO AN ATTACK MADE UPON IT BY SIXTEEN MEMBERS OF THE ASSEMBLY OF PENNSYLVANIA IN AN ADDRESS DATED SEPTEMBER 29, 1787

*Remarks on the Address of Sixteen Members of the Assembly of Pennsylvania to their constituents, dated September 29, 1787. With some strictures on their objections to the constitution recommended by the late Federal Convention.*[1] *(First published in Philadelphia, October 12, 1787.)*



I AM now to consider the objections of our sixteen members to the *New Constitution* itself, which is the most important part that lies on me.

1. Their first objection is, that the government proposed will be too expensive. I answer that if the appointments of offices are not more, and the compensations or emoluments of office not greater, than is necessary, the expense will be by no means burdensome, and thus must be left to the prudence of Congress; for I know of no way to control supreme powers from extravagance in this respect. Doubtless many instances may be produced of many needless offices being created, and many inferior officers, who receive far greater emoluments of office, than the first President of the State.

[1] The pamphlet was first published by Eleazer Oswald at the Coffee House. It was subsequently republished by Webster, in a somewhat abridged form, in his Essays. He then appended this note: "When the *new constitution* was laid before the Assembly of Pennsylvania, in *September*, 1787, a resolution passed the House (forty-three against nineteen) to call a *convention* to consider it, etc. Sixteen of the dissentients published an *address to their constituents, dated September* 27, 1787, stating their conduct, and assigning the reasons of it; but as there was very little in all this affair that reflected *much honor* on the *dissenting members* or *on the State to which they belonged*, and *nothing* that could *affect* or *concern* anybody out of that State, I have here omitted my remarks on all of it, but *their objections* to the *new constitution itself*, which being of general consequence to the States, inasmuch as that constitution (with a few amendments since adopted) is the same which now exists in full establishment through the Union, I therefore here insert, I say, *their objections and my remarks on them*, and leave out all the rest as matter of *local* concern at *that time*, but like to be little interesting to the public in general at this or any future time." It is the revised version that is reproduced here. The original text as published by Oswald may be found in the Library of Congress and in the Boston Athenæum.

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2. Their next objection is against a *legislature consisting of three branches.*[1] This is so far from an objection, that I consider it as an advantage. The most weighty and important affairs of the Union must be transacted in Congress; the most essential counsels must be there decided, which must all go thro' several discussions in three different chambers (all equally competent to the subject and equally governed by the same motives and interests, viz., the good of the great Commonwealth, and the approbation of the people) before any decision can be made; and when disputes are very high, different discussions are necessary, because they afford time for all parties to cool and reconsider.

This appears to me to be a very safe way and a very likely method to prevent any sudden and undigested resolutions from passing; and tho' it may delay or even destroy, a good bill, will hardly admit the passing of a bad one, which is by far the worst evil of the two. But if all this cannot stop the course of a bad bill, the negative of the President will at least give it further embarrassment, will furnish all the new light which a most serious discussion in a third House can give, and will make a new discussion necessary in each of the other two, where every member will have an opportunity to revise his opinion, to correct his arguments, and bring his judgment to the greatest maturity possible: if all this cannot keep the public decision within the bounds of wisdom, fitness, right, and convenience, it will be hard to find any efforts of human wisdom that can do it.

I believe it would be difficult to find a man in the Union, who would not readily consent to have Congress vested with all the vast powers proposed by the New Constitution if he could be sure that those powers would be exercised with wisdom, justice, and propriety, and not be abused; and I do not see that greater precautions and guards against abuses can well be devised, or more effectual methods used to throw every degree of light on every subject of debate, or more powerful motives to a reasonable and honest decision can be set before the minds of Congress, than are here proposed.

And if this is the best that can be obtained, it ought in all prudence to be adopted till better appears, rather than to be rejected merely because it is human, not perfect, and may be abused. At any rate I think it very plain that our chance of a right decision in a Congress of three branches, is much greater than in one single chamber; but however all this may be, I cannot see the least tendency in a Legislature of three branches to increase the burdens or taxes of the people. I think it very evident that any proposition of extravagant expense would be checked and embarrassed in such an assembly more than in a single House.

Farther, the two Houses being by their election taken from the body of the States, and being themselves principal inhabitants, will naturally have the interest of the Commonwealth sincerely at heart, their principle must be the same, their differences must (if any) in the mode of pur-

[1] In speaking of "a legislature consisting of three branches," he includes, as he explains a little later, the President and his advisers as "a third House."

suing it, or arise from local attachments; I say the great interest in their country, and the esteem, confidence, and approbation of their fellow-citizens, must be strong governing principles in both Houses, as well as in the President himself.[1]

3. Another objection is, that the Constitution proposed will *annihilate the state-governments, or reduce them to mere corporations.* I take it that this objection is thrown out (merely *invidiæ causa*) without the least ground for it; for I do not find *one article* of the Constitution proposed, which vests Congress, or *any of their officers or courts*, with a power *to interfere in the least in the internal police or government of any one state*, when the interests of *some other state*, or *strangers*, or *the Union* in general, are not *concerned;* and in such cases it is absolutely and manifestly necessary that Congress should have *a controlling power*, otherwise there would be *no end of controversies and injuries* between *different states*, nor any *safety for individuals*, nor any possibility *of supporting the Union* with any tolerable degree of honour, strength or security.

4. Another objection is against the *power of taxation vested in Congress.* But I answer, this is absolutely necessary and unavoidable, from the necessity of the case; I know it is a *tender point*, a *vast power*, and a *terrible engine of oppression* and *tyranny* when *wantonly, injudiciously*, or *wickedly used*, but *must be admitted;* for it is impossible to support the Union, or indeed any government, *without expense* — the Congress are the *proper judges* of that expense, the *amount* of it, and the best *means* of supplying it; the *safety* of the states *absolutely requires* that this power be lodged *somewhere*, and no *other body* can have the least pretensions to it; and *no part* of the resources of the states can, with any safety be *exempt*, when the *exigencies* of the Union or government require their *utmost exertion.*

The *stronger we make our government, the greater protection it can afford us*, and the *greater* will our *safety be* under it. It is easy enough here to harangue on the *arts of a court* to create occasions for money, or the unbounded *extravagance* with which they can spend it; but all this notwithstanding, we must take our courts as we do our wives, *for better or for worse.* We hope the best of an *American Congress*, but if they disappoint us, we cannot help it; it is in vain to try to form any plan of *avoiding the frailties* of human nature. — Would any man choose a *lame* horse lest a *sound* one should run away with him? or will any man prefer a *small tent* to live in, before a *large house*, which may *fall down* and *crush him* in its ruins? No man has any right to find fault with this article, till he can substitute a better in its room.

The sixteen Members attempt to aggravate the horrors of this devouring power, by suggesting the rigid severity with which Congress, with their *faithful soldiers*, will *exact and collect* the taxes. This picture, stripped of its *black drapery*, amounts to just this, viz., that whatever

[1] "Vide a Dissertation on the Political Union and Constitution of the Thirteen United States, published by a Citizen of Philadelphia, February 16, 1783, where the subject is taken up at large." Taken from the text of the original pamphlet.

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taxes are laid will be collected, without exception, from every person charged with them, which must look disagreeable, I suppose, to people who, by one shift or another, have avoided paying taxes all their lives.

But it is a plain truth, and will be obvious to anybody who duly considers it, that nothing can be more ruinous to a *state*, or oppressive to *individuals*, than a *partial and dilatory collection* of taxes, especially where the tax is an impost or excise, because the man who *avoids* the tax, can *undersell*, and consequently *ruin*, him who *pays* it, *i. e.*, smuggling ruins the fair trader, and a *remedy* of this mischief, I cannot suppose, will be deemed by our people in general such a *very awful judgment*, as the sixteen members would make us believe their constituents will consider it to be.

5. They object, that the *liberty of the press is* not asserted in the Constitution. I answer, neither are any of the *ten commandments*, but I do not think that it follows that it was the design of the Convention to sacrifice either *the one* or *the other* to contempt, or to leave them void of protection and effectual support.

6. It is objected farther, that the Constitution contains *no declaration of rights*. I answer, this is not true: the Constitution contains a declaration of many rights, and very important ones, *e. g.*, that people shall be obliged to *fulfil their contracts*, and *not avoid* them by *tenders* of anything less than the value stipulated; that no *ex post facto* laws shall be made, etc., but it was no part of the business of their appointment to make *a code of laws;* it was sufficient *to fix the Constitution right*, and that would pave the way for the most effectual security of the rights of the subject.

7. They further object, that no provision is made against a *standing army in time of peace*. I answer, that a standing army, *i. e.*, regular troops, are often necessary in time of peace, to prevent a war, to guard against sudden invasions, for garrison duty, to quell mobs and riots, as guards to Congress and perhaps other courts, etc., as military schools to keep up the knowledge and habits of military discipline and exercise, etc., and as the power of raising troops is rightfully and without objection vested in Congress, so they are the *properest and best judges* of the *number* requisite, and the *occasion*, *time*, and *manner* of employing them; if they are not wanted on military duty they may be employed in making *public roads*, *fortifications*, or any other *public works:* they need not be an *useless burden* to the States: and for all this the prudence of Congress must be trusted, and nobody can have a right to object to this, till they can point out some way of doing better.

8. Another objection is, that the New Constitution *abolishes trial by jury in civil causes*. I answer, I do not see one word in the Constitution which, by any candid construction, can support even the remotest suspicion that this ever entered into the heart of one Member of the Convention: I therefore set down the suggestion for sheer malice, and so dismiss it.

9. Another objection is, that the federal *judiciary is so constructed as to destroy the judiciaries of the several states*, and that the *appellate juris-*

*diction, with respect to law and fact, is unnecessary.* I answer, both the *original* and *appellate* jurisdiction of the federal judiciary are manifestly necessary, where the cause of action affects the citizens of *different* states, the *general interest* of the Union; or *strangers* (and to cases of *these descriptions only* does the *jurisdiction* of the federal judiciary *extend*); I say, these jurisdictions of the federal judiciary are manifestly necessary for the reasons just now given under the third objection.

I do not see how they can avoid trying any issue joined before them, whether the thing to be decided is *law* or *fact;* but I think no doubt can be made, that if the issue joined is *fact*, it must be tried by jury.

10. They object, that the *election of Delegates* for the House of Representatives *is for two years*, and of Senators, *for six years*. I think this a manifest *advantage*, rather than an *objection*. Very great inconveniences must necessarily arise from a too frequent change of the Members of large legislative or executive bodies, while the revision of every past transaction must be taken up, explained, and discussed anew for the information of the new Members; where the settled rules of the House are little understood by them, etc., all which ought to be avoided, if it can be with safety.

Further, it is plain that any man who serves in such bodies is better qualified the second year than he could be the first, because experience adds qualifications for every business, etc. The only objection is, that long continuance affords danger of corruption, but for this the Constitution provides a remedy by impeachment and expulsion, which will be sufficient restraint, unless a majority of the House and Senate should become corrupt, which is not easily presumable: in fine, there is a *certain mean* between too *long* and too *short* continuances of Members in Congress, and I cannot see but it is judiciously fixed by the Convention.

Upon the whole matter, I think the sixteen Members have employed *an address-writer* of great dexterity, who has given us a strong sample of *ingenious malignity and ill nature* — a masterpiece of *high colouring* in the *scare-crow* way; in his account of the conduct of the sixteen Members, by an unexpected openness and candour, he avows *facts* which he certainly cannot expect to justify, or even hope that their constituents will patronize or even approve, but he seems to lose all candour when he deals *in sentiments;* when he comes to point out the *nature* and *operation* of the *New Constitution*, he appears to mistake the *spirit* and *true principles* of it very much; or, which is worse, takes pleasure in showing it in the *worst light* he can paint it in.

I however agree with him in this, "that this is *the time for consideration and minute examination*"; and, I think, the great subject, when viewed seriously without passion or prejudice, will *bear*, and *brighten under, the severest examination* of the rational enquirer. If the *provisions* of the law or Constitution do not exceed the *occasions*, if the *remedies* are not extended beyond the *mischiefs*, the government cannot be justly charged with *severity;* on the other hand, if the provisions are not *adequate* to the occasions, and the remedies *not equal to* the mischiefs, the government must be *too lax*, and not sufficiently operative to give the

necessary *security* to the subject: to form a right judgment, we must compare these two things well together, and not suffer our minds to dwell on one of them alone, without considering it in *connection* with the other; by this means we shall easily see that the one makes the other necessary.

Were we to view only the *gaols* and *dungeons*, the *gallows* and *pillories*, the *chains* and *wheelbarrows*, of any State, we might be induced to think the government *severe;* but when we turn our attention to the *murders* and *parricides*, the *robberies* and *burglaries*, the *piracies* and *thefts*, *which merit these punishments*, our idea of *cruelty* vanishes at once, and we admire the *justice*, and perhaps *clemency* of that government, which before *shocked* us as too severe. So when we fix our attention only on the *superlative authority* and *energetic force* vested in Congress, and our federal executive powers by the New Constitution, we may at first sight be induced to think that we yield more of the *sovereignty of the States* and *of personal liberty*, than is requisite to maintain the federal government; but when, on the other hand, we consider with full survey the *vast supports* which the Union requires, and the *immense consequence* of that UNION to us all, we shall probably soon be convinced that the powers aforesaid, *extensive* as they are, are not *greater* than is necessary for our benefit: for,

1. *No laws of any State, which do not carry in them a force which extends to their effectual and final execution, can afford a certain and sufficient security to the subject;* for,

2. *Laws of any kind, which fail of execution, are worse than none*, because they *weaken* the government, expose it to *contempt*, destroy the *confidence* of all men, both subjects and strangers, in it, and *disappoint* all men who have *confided in it.*

In fine, *our union* can never be supported without *definite* and *effectual* laws, which are co-extensive with their occasions, and which are supported by authorities and powers which can give them *execution with energy;* if admitting such powers into our Constitution can be called a *sacrifice*, it is a *sacrifice to safety*, and the only question is, whether our UNION or federal government is worth this sacrifice.

*Our* UNION, I say, *under the protection of which* every individual rests secure against *foreign* and *domestic* insult and oppression; but *without it* we can have no security against invasions, insults, and oppressions of *foreign powers*, or against the inroads and wars of *one State on another*, or even against *insurrections* and *rebellions* arising within particular States, by which our wealth and strength, as well as ease, comfort, and safety, will be devoured by *enemies growing out of our own bowels.*

It is *our* UNION *alone* which can give us *respectability abroad* in the eyes of foreign nations, and secure to us all the advantages both of *trade and safety*, which can be derived from *treaties with them.*

The Thirteen States, all united and well cemented together, are a *strong*, *rich*, and *formidable* body not of *stationary*, matured power, but *increasing* every day in riches, strength and numbers.

Thus circumstanced, we can demand the attention and respect of all foreign nations, but they will give us both in *exact proportion* to the *solidity of our union:* for if they observe our *union* to be *lax*, from *insufficient* principles of cement in our *Constitution*, or *mutinies* and *insurrections* of our own people (which are the direct consequence of an *insufficient cement of union*); I say, when foreign nations see either of these, they will immediately *abate* of their *attention* and *respect* to us, and *confidence* in us.

And as it appears to me, that the New Constitution does not vest Congress with *more* or *greater* powers than are necessary to support this *important union*, I wish it may be admitted in the most *cordial* and *unanimous* manner by all the States.

It is a *human* composition, and may have *errors* which future experience will enable us to discover and correct; but I think it is very plain, if it has faults, that the address-writer of the sixteen members has not been able to find them; for he has all along either hunted down *phantoms of error*, that have no *real existence*, or, which is worse, *tarnished real excellencies* into *blemishes*.

I have dwelt the longer on these remarks of this writer, because I observe that all the scribblers in our papers against the New Constitution, have taken their cue principally from him; all their lucubrations contain little more than *his ideas* dressed out in a great variety of forms; one of which colours so high as to make the New Constitution strongly resemble the *Turkish government* (*vide Gazetteer*, of the 10th instant) which, I think, comes about as near the truth as any of the rest, and brings to my mind a sentiment in polemical divinity, which I have somewhere read, that there were once great disputes and different opinions among drones about the *mark which was set on Cain*, when one of them very gravely thought it was *born fully grown out on his forehead*. It is probable he could not think of a *worse mark* than that.

On the whole matter, there is no aid to extravagancies of the human fancy which are commonly dictated by *poignant feelings*, *disordered passions*, or *affecting interests;* but I could wish my fellow-citizens, in the matter of vast importance before us, would divest themselves of bias, passion, and *little personal* or *local interests*, and consider the great subject with that dignity of reason, and independence of sentiment, which national interests ever require.

I have here given my sentiments with the most unbiased freedom, and hope they will be received with the most candid attention and unbiased discussion by the State in which I *live*, and in which I expect *to leave my children*.

I will conclude with one observation, which I take to be very capital, viz., that the distresses and oppressions, both of nations and individuals, often arise from the *powers of government* being *too limited* in their principle, too *indeterminate* in their *definition*, or too *lax* in their *execution*, and, of course the safety of the citizens depends much on *full* and *definite* powers of government, and an *effectual execution* of them.

# XX

# THE CONSTITUTION OF THE UNITED STATES AND ITS AMENDMENTS, WITH NOTES AND ANNOTATIONS TO DATE [1]



WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

Chisholm *v.* Georgia, 2 Dall. 419; McCulloch *v.* State of Maryland et al., 4 Wh. 316; Brown et al. *v.* Maryland, 12 Wh. 419; Barron *v.* The Mayor and City Council of Baltimore, 7 Pet. 243; Lane County *v.* Oregon, 7 Wall. 71; Texas *v.* White et al., 7 Wall. 700; Claflin *v.* Houseman, assignee, 93 U. S. 130; Williams *v.* Bruffy, 96 U. S. 176; Tennessee *v.* Davis, 100 U. S. 257; Langford *v.* United States, 101 U. S. 341; United States *v.* Jones, 109 U. S. 513; Fort Leavenworth Railroad Co. *v.* Lowe, 114 U. S. 525; The Chinese Exclusion Case, 130 U. S. 581; Geofroy *v.* Riggs, 133 U. S. 258; In re Neagle, 135 U. S. 1; In re Ross, 140 U. S. 453; Logan *v.* United States, 144 U. S. 263; Lascelles *v.* Georgia, 148 U. S. 537; Fong Yue Ting *v.* United States, 149 U. S. 698; In re Tyler, 149 U. S. 164; United States *v.* E. C. Knight Co., 156 U. S. 1; Mattox *v.* United States, 156 U. S. 237; In re Quarles and Butler, 158 U. S. 532; In re Debs, Petitioner, 158 U. S. 564; Ward *v.* Race Horse, 163 U. S. 504; De Lima *v.* Bidwell, 182 U. S. 1; Prout *v.* Starr, 188 U. S. 537; Jacobson *v.* Massachusetts, 197 U. S. 11; South Carolina *v.* United States, 199 U. S. 437; Ellis *v.* United States, 206 U. S. 246; Muller *v.* Oregon, 208 U. S. 412.

## ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Hayburn's Case (notes), 2 Dall. 409; Field *v.* Clark, 143 U. S. 649; Union Bridge Co. *v.* United States, 204 U. S. 364; United States *v.* Heinszen, 206 U. S. 370; St. Louis and Iron Mountain Railway *v.* Taylor, 210 U. S. 281.

SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States,

[1] I am indebted to my learned friend, James H. Dorman, for valuable assistance in preparing the table of cases.

and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

In re Green, 134 U. S. 377; Wiley *v.* Sinkler, 179 U. S. 58; Ex parte Yarbrough, 110 U. S. 651.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] [1] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Dred Scott *v.* Sandford, 19 Howard, 393; Veazie Bank *v.* Fenno, 8 Wall. 533; Scholey *v.* Rew, 23 Wall. 331; De Treville *v.* Smalls, 98 U. S. 517; Gibbons *v.* District of Columbia, 116 U. S. 404; Pollock *v.* Farmers' Loan & Trust Co. (Income Tax Case), 157 U. S. 429; Pollock *v.* Farmers' Loan & Trust Co. (Rehearing), 158 U. S. 601; Thomas *v.* United States, 192 U. S. 363.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies

[1] The clause included in brackets is amended by the Fourteenth Amendment, second section.

happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice-President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Ex parte Siebold, 100 U. S. 371; Ex parte Clarke, 100 U. S. 399; Ex parte Yarbrough, 110 U. S. 651; United States *v.* Waddell et al., 112 U. S. 76; In re Coy, 127 U. S. 731.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

In re Loney, 134 U. S. 372; United States *v.* Ballin, 144 U. S. 1.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Anderson *v.* Dunn, 6 Wh. 204; Kilbourn *v.* Thompson, 103 U. S. 168; United States *v.* Ballin, 144 U. S. 1; In re Chapman, 166 U. S. 661.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Field *v.* Clark, 143 U. S. 649; United States *v.* Ballin, 144 U. S. 1; Twin City Bank *v.* Nebeker, 167 U. S. 196; Wilkes County *v.* Coler, 180 U. S. 506.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Coxe *v.* M'Clenachan, 3 Dall. 478; Kilbourn *v.* Thompson, 103 U. S. 168; Williamson *v.* United States, 207 U. S. 425.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Field *v.* Clark, 143 U. S. 649; Twin City Bank *v.* Nebeker, 167 U. S. 196; Millard *v.* Roberts, 202 U. S. 429.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the

Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Field *v.* Clark, 143 U. S. 649; United States *v.* Ballin, 144 U. S. 1; Twin City Bank *v.* Nebeker, 167 U. S. 196; La Abra Silver Mining Co. *v.* United States, 175 U. S. 423; Wilkes County *v.* Coler, 180 U. S. 506.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Field *v.* Clark, 143 U. S. 649; United States *v.* Ballin, 144 U. S. 1; Fourteen Diamond Rings *v.* United States, 183 U. S. 176.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Hylton *v.* United States, 3 Dall. 171; McCulloch *v.* State of Maryland, 4 Wh. 316; Loughborough *v.* Blake, 5 Wh. 317; Osborn *v.* Bank of the United States, 9 Wh. 738; Weston et al. *v.* City Council of Charleston, 2 Pet. 449; Dobbins *v.* The Commissioners of Erie County, 16 Pet. 435; License Cases, 5 How. 504; Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How. 299; McGuire *v.* The Commonwealth, 3 Wall. 387; Van Allen *v.* The Assessors, 3 Wall. 573; Bradley *v.* The People, 4 Wall. 459; License Tax Cases, 5 Wall. 462; Pervear *v.* The Commonwealth, 5 Wall. 475; Woodruff *v.* Parham, 8 Wall. 123; Hinson *v.* Lott, 8 Wall. 148; Veazie Bank *v.* Fenno, 8 Wall. 533; The Collector *v.* Day, 11 Wall. 113; United States *v.* Singer, 15 Wall. 111; State Tax on Foreign-held Bonds, 15 Wall. 300; United States *v.* Railroad Company, 17 Wall. 322; Railroad Company *v.* Peniston, 18 Wall. 5; Scholey *v.* Rew, 23 Wall. 331; Springer *v.* United States, 102 U. S. 586; Legal Tender Case, 110 U. S. 421; California *v.* Central Pacific Railroad Co., 127 U. S. 1; Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411; Leloup *v.* Port of Mobile, 127 U. S. 640; Field *v.* Clark, 143 U. S. 649; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429; United States *v.* Realty Co., 163 U. S. 427; Nicol *v.* Ames, 173 U. S. 509; Knowlton *v.* Moore, 178 U. S. 41; De Lima *v.* Bidwell, 182 U. S. 1; Dooley *v.* United States, 182 U. S. 222; Fourteen Diamond Rings *v.* United States, 183 U. S. 176; Felsenheld *v.* United States, 186 U. S. 126; Thomas *v.* United States, 192 U. S. 363; Binns *v.* United States, 194 U. S. 486; South Carolina *v.* United States, 199 U. S. 437.

To borrow money on the credit of the United States;

McCulloch *v.* The State of Maryland, 4 Wh. 316; Weston et al. *v.* The City Council of Charleston, 2 Pet. 449; Bank of Commerce *v.*

New York City, 2 Black, 620; Bank Tax Cases, 2 Wall. 200; The Banks *v.* The Mayor, 7 Wall. 16; Bank *v.* Supervisors, 7 Wall. 26; Hepburn *v.* Griswold, 8 Wall. 603; National Bank *v.* Commonwealth, 9 Wall. 353; Parker *v.* Davis, 12 Wall. 457; Legal Tender Case, 110 U. S. 421; Home Insurance Company *v.* New York, 134 U. S. 594; Home Savings Bank *v.* Des Moines, 205 U. S. 503.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Gibbons *v.* Ogden, 9 Wh. 1; Brown et als. *v.* State of Maryland, 12 Wh. 419; Wilson et al. *v.* Black Bird Creek Marsh Company, 2 Pet. 245; Worcester *v.* The State of Georgia, 6 Pet. 515; City of New York, *v.* Miln, 11 Pet. 102; United States *v.* Coombs, 12 Pet. 72; Holmes *v.* Jennison et al., 14 Pet. 540; License Cases, 5 How. 504; Passenger Cases, 7 How. 283; Nathan *v.* Louisiana, 8 How. 73; Mager *v.* Grima et al., 8 How. 490; United States *v.* Marigold, 9 How. 560; Cowley *v.* Board of Wardens of Port of Philadelphia, 12 How. 299; The Propeller Genesee Chief et al. *v.* Fitzhugh et al., 12 How. 443; State of Pennsylvania *v.* The Wheeling Bridge Co., 13 How. 518; Veazie et al. *v.* Moore, 14 How. 568; Smith *v.* State of Maryland, 18 How. 71; State of Pennsylvania *v.* The Wheeling and Belmont Bridge Co. et al., 18 How. 421; Sinnot *v.* Davenport, 22 How. 227; Foster et al. *v.* Davenport et al., 22 How. 244; Conway et al. *v.* Taylor's Ex., 1 Black 603; United States *v.* Holliday, 3 Wall. 407; Gilman *v.* Philadelphia, 3 Wall. 713; The Passaic Bridges, 3 Wall. 782; Steamship Company *v.* Port Wardens, 6 Wall. 31; Crandall *v.* State of Nevada, 6 Wall. 35; White's Bank *v.* Smith, 7 Wall. 646; Waring *v.* The Mayor, 8 Wall. 110; Paul *v.* Virginia, 8 Wall. 168; Thomson *v.* Pacific Railroad, 9 Wall. 579; Downham et al. *v.* Alexandria Council, 10 Wall. 173; The Clinton Bridge, 10 Wall. 454; The Daniel Ball, 10 Wall. 557; Liverpool Insurance Company *v.* Massachusetts, 10 Wall. 566; The Montello, 11 Wall. 411; Ex parte McNiel, 13 Wall. 236; State Freight Tax, 15 Wall. 232; State Tax on Railway Gross Receipts, 15 Wall. 284; Osborn *v.* Mobile, 16 Wall. 479; Railroad Company *v.* Fuller, 17 Wall. 560; Bartemeyer *v.* Iowa, 18 Wall. 129; The Delaware Railroad Tax, 18 Wall. 206; Peete *v.* Morgan, 19 Wall. 581; Railroad Company v. Richmond, 19 Wall. 584; B. and O. Railroad Company *v.* Maryland, 21 Wall. 456; The Lottawanna, 21 Wall. 558; Henderson et al. *v.* The Mayor of the City of New York, 92 U. S. 259; Chy Lung *v.* Freeman et al., 92 U. S., 275; South Carolina *v.* Georgia et al., 93 U. S. 4; Sherlock et al. *v.* Alling, adm., 93 U. S. 99; United States *v.* Forty-three Gallons of Whisky, etc., 93 U. S. 188; Foster *v.* Master and Wardens of the Port of New Orleans, 94 U. S. 246; Railroad Co. *v.* Husen, 95 U. S. 465; Pensacola Tel. Co. *v.* W. U. Tel. Co., 96 U. S. 1; Beer Co. *v.* Massachusetts, 97 U. S. 25; Cook *v.* Pennsylvania, 97 U. S. 566; Packet Co. *v.* St. Louis, 100 U. S. 423; Wilson *v.* McNamee, 102 U. S. 572; Moran *v.* New Orleans, 112 U. S. 69; Head Money Cases, 112 U. S. 580; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Brown *v.* Houston, 114 U. S. 622; Walling *v.* Michigan, 116 U. S. 446; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; Tennessee *v.* Pullman Southern Car Co., 117 U. S. 51; Spraigue *v.* Thompson, 118 U. S. 90; Morgan *v.* Louisiana, 118 U. S. 455; Wabash, St. Louis and Pacific

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Ry. *v.* Illinois, 118 U. S. 557; Huse *v.* Glover, 119 U. S. 543; Robbins *v.* Shelby Co. Taxing Dist., 120 U. S. 489; Corson *v.* Maryland, 120 U. S. 502; Barron *v.* Burnside, 121 U. S. 186; Fargo *v.* Michigan, 121 U. S. 230; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; Phila. and Southern S. S. Co. *v.* Penna., 122 U. S. 326; W. U. Tel. Co. *v.* Pendleton, 122 U. S. 347; Sands *v.* Manistee River Imp. Co., 123 U. S. 288; Smith *v.* Alabama, 124 U. S. 465; Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1; Pembina Mine Co. *v.* Penna., 125 U. S. 181; Bowman *v.* Chicago Northwestern Rwy. Co., 125 U. S. 465; Western Union Tel. Co. *v.* Mass., 125 U. S. 530; California *v.* Central Pacific R. R. Co., 127 U. S. 1; Leloup *v.* Port of Mobile, 127 U. S. 640; Kidd *v.* Pearson, 128 U. S. 1; Asher *v.* Texas, 128 U. S. 129; Stoutenberg *v.* Hennick, 129 U. S. 141; Western Union Tel. Co. *v.* Alabama, 132 U. S. 472; Fritts *v.* Palmer, 132 U. S. 282; Louisville, N. O., &c., Railway *v.* Mississippi, 133 U. S. 587; Leisy *v.* Hardin, 135 U. S. 100; Lyng *v.* Michigan, 135 U. S. 161; Cherokee Nation *v.* Kansas Railway Co., 135 U. S. 641; McCall *v.* California, 136 U. S. 104; Norfolk & Western R. Rd. *v.* Pennsylvania, 136 U. S. 114; Minnesota *v.* Barber, 136 U. S. 313; Texas & Pacific Ry. Co. *v.* Southern Pacific Co., 137 U. S. 48; Brimmer *v.* Rebman, 138 U. S. 78; Manchester *v.* Massachusetts, 139 U. S. 240; In re Rahrer, 140 U. S. 545; Pullman Palace Car Co. *v.* Penna., 141 U. S. 18; Pullman Palace Car Co. *v.* Hayward, 141 U. S. 36; Att'y-Gen. *v.* West'n Union Tel. Co., 141 U. S. 40; Crutcher *v.* Kentucky, 141 U. S. 47; Henderson Bridge Co. *v.* Henderson, 141 U. S. 679; In re Garnett, 141 U. S. 1; Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217; Nishimura Ekin *v.* U. S., 142 U. S. 651; Pacific Ex. Co. *v.* Seibert, 142 U. S. 339; Horn Silver Mining Co. *v.* New York, 143 U. S. 305; Chic. & Grand Trunk Ry. Co. *v.* Wellman, 143 U. S. 339; Budd *v.* N. Y., 143 U. S. 517; Ficklen *v.* Shelby Co. Taxing Dist., 145 U. S. 1; Lehigh Valley R. Rd. *v.* Pennsylvania, 145 U. S. 192; Interstate Commerce Comm'n *v.* B. & O. R. Rd., 145 U. S. 264; Brennan *v.* Titusville, 153 U. S. 289; Brass *v.* Stoeser, 153 U. S. 391; Ashley *v.* Ryan, 153 U. S. 436; Luxton *v.* N. River Bridge Co., 153 U. S. 529; Erie R. Rd. *v.* Pennsylvania, 153 U. S. 628; Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692; Covington & Cinc'ti Bridge Co. *v.* Ky., 154 U. S. 204; Plumley *v.* Mass., 155 U. S. 461; Texas & Pacific Rwy. Co. *v.* Interstate Transfer Co., 155 U. S. 585; Hooper *v.* Calif., 155 U. S. 648; Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688; U. S. *v.* E. C. Knight Co., 156 U. S. 1; Emert *v.* Missouri, 156 U. S. 296; N. Y., L. E. & West'n *v.* Penna., 158 U. S. 431; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S. 577; Pittsburgh & So. Coal Co. *v.* La., 156 U. S. 590; Gulf, Colo. & S. F. Rwy. Co. *v.* Hefley, 158 U. S. 98; In re Debs, 158 U. S. 564; Geer *v.* Conn., 161 U. S. 519; Western Union Telegraph Co. *v.* James, 162 U. S. 650; Western Union Telegraph Co. *v.* Taggart, 163 U. S. 1; Illinois Cent. R. R. Co., *v.* Illinois, 163 U. S. 142; Hennington *v.* Georgia, 163 U. S. 299; Osborne *v.* Florida, 164 U. S. 650; Scott *v.* Donald, 165 U. S. 58; Adams Ex. Co. *v.* Ohio, 165 U. S. 194; New York, &c., R. R. Co. *v.* New York, 165 U. S. 628; Gladson *v.* Minn., 166 U. S. 427; Chicago, &c., Ry. Co. *v.* Solan, 169 U. S. 133; Missouri, &c., Ry. Co. *v.* Haber, 169 U. S. 613; Richmond, &c., R. R. Co. *v.* Patterson, 169 U. S. 311; Rhodes *v.* Iowa, 170 U. S. 412; Vance *v.* Vandercook, 170 U. S. 438; Schollenberger *v.* Pa., 171 U. S. 1; Collins *v.* N. H., 171 U. S. 30; Patapsco Guano Co. *v.* N. C., 171 U. S. 345; New York *v.* Roberts, 171 U. S. 658; Lake Shore,

&c., Ry. Co. *v.* Ohio, 173 U. S. 285; Nicol *v.* Ames, 173 U. S. 509; Missouri, &c., Ry. Co. *v.* McCann, 174 U. S. 580; Addyston Pipe & Steel Co. *v.* U. S., 175 U. S. 211; Lindsay & Phelps Co. *v.* Mullen, 176 U. S. 126; Williams *v.* Fears, 179 U. S. 270; Wisconsin, &c., R. R. Co. *v.* Jacobson, 179 U. S. 287; Chesapeake, &c., Ry. Co. *v.* Kentucky, 179 U. S. 388; Scranton *v.* Wheeler, 179 U. S. 141; Reymann Brewing Co. *v.* Brister, 179 U. S. 445; W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452; Rasmussen *v.* Idaho, 181 U. S. 198; Smith *v.* St. Louis & Southwestern Railroad Co., 181 U. S. 248; Capital City Dairy Co. *v.* Ohio, 183 U. S. 238; Louisville & Nashville Railroad Co. *v.* Kentucky, 183 U. S. 503; Nutting *v.* Massachusetts, 183 U. S. 553; McChord *v.* Louisville & Nashville Railroad Co., 183 U. S. 483; Louisville & Nashville Railroad Co. *v.* Eubank, 184 U. S. 27; Stockard *v.* Morgan, 185 U. S. 27; Minneapolis & St. Louis R. R. Co. *v.* Minnesota, 186 U. S. 257; Reid *v.* Colorado, 187 U. S. 137; Western Union Tel. Co. *v.* New Hope, 187 U. S. 419; Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611; Louisville, etc., Ferry Co. *v.* Kentucky, 188 U. S. 385; United States *v.* Lynah, 188 U. S. 445; Cummings *v.* Chicago, 188 U. S. 410; The Roanoke, 189 U. S. 185; Montgomery *v.* Portland, 190 U. S. 89; Patterson *v.* Bark Eudora, 190 U. S. 169; Allen *v.* Pullman Co., 191 U. S. 171; Pennsylvania R. R. Co. *v.* Knight, 192 U. S. 21; Postal Telegraph Cable Co. *v.* Taylor, 192 U. S. 64; Crossman *v.* Lurman, 192 U. S. 189; St. Clair County *v.* Interstate Transfer Co., 192 U. S. 454; Buttfield *v.* Stranahan, 192 U. S. 470; American Steel & Wire Co. *v.* Speed, 192 U. S. 500; Northern Securities Co. *v.* United States, 193 U. S. 197; Montague & Co. *v.* Lowry, 193 U. S. 38; Field *v.* Barber Asphalt Co., 194 U. S. 618; Minnesota *v.* Northern Securities Co. 194 U. S. 48; Olsen *v.* Smith, 195 U. S. 332; Western Union Telegraph Co. *v.* Pennsylvania R. R., 195 U. S. 540; Central of Georgia Railway Co. *v.* Murphey, 196 U. S. 194; American Express Co. *v.* Iowa, 196 U. S. 133; Cook *v.* Marshall County, 196 U. S. 261; Matter of Heff (Indian), 197 U. S. 488; Foppiano *v.* Speed, 199 U. S. 501; Houston & Texas Central Railroad *v.* Mayes, 201 U. S. 321; McLean *v.* Denver & Rio Grande R. R., 203 U. S. 38; Rearick *v.* Pennsylvania, 203 U. S. 507; Mississippi R. R. Comm. *v.* Illinois Central R. R., 203 U. S. 335; Martin *v.* Pittsburg & Lake Erie R. R., 203 U. S. 284; Hatch *v.* Reardon, 204 U. S. 152; Wilson *v.* Shaw, 204 U. S. 24; Union Bridge Co. *v.* U. S., 204 U. S. 364; Lee *v.* New Jersey, 207 U. S. 67; Atlantic Coast Line *v.* Wharton, 207 U. S. 328; Employers' Liability Cases, 207 U. S. 463; Dick *v.* U. S., 208 U. S. 340; Darnell & Son *v.* Memphis, 208 U. S. 113; Adair *v.* U. S., 208 U. S. 161; Burke *v.* Wells, 208 U. S. 14; General Oil Co. *v.* Crain, 209 U. S. 211; Ware & Leland *v.* Mobile County, 209 U. S. 405; Asbell *v.* Kansas, 209 U. S. 251; Galveston, Harrisburg, etc., Railway Co. *v.* Texas, 210 U. S. 217; United States ex rel. Atty. Gen. *v.* Delaware & H. Co., 213 U. S. 366; Oceanic Steam Nav. Co. *v.* Stranahan, 214 U. S. 320; International Mercantile Marine Co. *v.* Stranahan, 214 U. S. 344; Interstate Com. Commission *v.* Illinois C. R. Co., 215 U. S. 452; Interstate Com. Commission *v.* Chicago & A. R. Co., 215 U. S. 479; Monongahela Bridge Co. *v.* United States, 216 U. S. 177.

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Sturges *v.* Crowinshield, 4 Wh. 122; McMillan *v.* McNeil, 4 Wh.

209; Farmers' and Mechanics' Bank, Pennsylvania, *v.* Smith, 6 Wh. 131; Ogden *v.* Saunders, 12 Wh. 213; Boyle *v.* Zacharie and Turner, 6 Pet. 348; Gassies *v.* Ballon, 6 Pet. 761; Beers et al. *v.* Haughton, 9 Pet. 329; Suydam et al. *v.* Broadnax, 14 Pet. 67; Cook *v.* Moffat et al., 5 How. 295; Dred Scott *v.* Sandford, 19 How. 393; Nishimura Ekiu *v.* The United States, 142 U. S. 651; Hanover National Bank *v.* Moyses, 186 U. S. 181.

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Pet. 257; Fox *v.* The State of Ohio, 5 How. 410; United States *v.* Marigold, 9 How. 560.

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

Fox *v.* The State of Ohio, 5 How. 410; United States *v.* Marigold, 9 How. 560.

To establish Post Offices and post Roads;

State of Pennsylvania *v.* The Wheeling and Belmont Bridge Company, 18 How. 421; Horner *v.* United States, 143 U. S. 207; In re Rapier, 143 U. S. 110; In re Debs, 158 U. S. 564; Illinois Central Railroad Co. *v.* Illinois, 163 U. S. 142; Gladson *v.* Minnesota, 166 U. S. 427; Public Clearing House *v.* Coyne, 194 U. S. 497; Western Union Telegraph Co. *v.* Pennsylvania R. R. Co., 195 U. S. 540; Martin *v.* Pittsburg & Lake Erie R. R., 203 U. S. 284.

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Grant et al. *v.* Raymond, 6 Pet. 218; Wheaton et als. *v.* Peters et al., 8 Pet. 591; Trade-mark Cases, 100 U. S. 82; Burrow Giles Lithographic Co. *v.* Sarony, 111 U. S. 53; United States *v.* Duell, 172 U. S. 576; Bobbs-Merrill Co. *v.* Straus, 210 U. S. 339.

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

United States *v.* Palmer, 3 Wh. 610; United States *v.* Wiltberger, 5 Wh. 76; United States *v.* Smith, 5 Wh. 153; United States *v.* Pirates, 5 Wh. 184; United States *v.* Arjona, 120 U. S. 479.

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Brown *v.* United States, 8 Cr. 110; American Insurance Company et al. *v.* Canter (356 bales cotton), 1 Pet. 511; Mrs. Alexander's Cotton, 2 Wall. 404; Miller *v.* United States, 11 Wall. 268; Tyler *v.* Defrees, 11 Wall. 331; Stewart *v.* Kahn, 11 Wall. 493; Hamilton *v.* Dillin, 21 Wall. 73; Lamar, ex., *v.* Browne et al., 92 U. S. 187; Mayfield *v.* Richards, 115 U. S. 137; The Chinese Exclusion Cases, 130 U. S. 581; Mormon Church *v.* United States, 136 U. S. 1; Nishimura Ekiu *v.* United States, 142 U. S. 651.

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Crandall *v.* State of Nevada, 6 Wall. 35; Nishimura Ekiu *v.* United States, 142 U. S. 651.

To provide and maintain a Navy;

United States *v.* Bevans, 3 Wh. 336; Dynes *v.* Hoover, 20 How. 65.

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Houston *v.* Moore, 5 Wh. 1; Martin *v.* Mott, 12 Wh. 19; Luther *v.* Borden, 7 How. 1; Crandall *v.* State of Nevada, 6 Wall. 35; Texas *v.* White, 7 Wall. 700.

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Houston *v.* Moore, 5 Wh. 1; Martin *v.* Mott, 12 Wh. 19; Luther *v.* Borden, 7 How. 1; Presser *v.* Illinois, 116 U. S. 252.

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

Hepburn et al. *v.* Ellzey, 2 Cr. 444; Loughborough *v.* Blake, 5 Wh. 317; Cohens *v.* Virginia, 6 Wh. 264; American Insurance Company *v.* Canter (356 bales cotton), 1 Pet. 511; Kendall, Postmaster-General, *v.* The United States, 12 Pet. 524; United States *v.* Dewitt, 9 Wall. 41; Dunphy *v.* Kleinschmidt et al., 11 Wall. 610; Willard *v.* Presbury, 14 Wall 676; Kohl et al. *v.* United States, 91 U. S. 367; Phillips *v.* Payne, 92 U. S. 130; United States *v.* Fox, 94 U. S. 315; National Bank *v.* Yankton County, 101 U. S. 129; Ft. Leavenworth R. Rd. Co. *v.* Howe, 114 U. S. 525; Benson *v.* United States, 146 U. S. 325; Shoemaker *v.* United States, 147 U. S. 282; Chappell *v.* United States, 160 U. S. 499; Ohio *v.* Thomas, 173 U. S. 276; Wight *v.* Davidson, 181 U. S. 371; Battle *v.* United States, 209 U. S. 36.

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

McCulloch *v.* The State of Maryland, 4 Wh. 316; Wayman *v.* Southard, 10 Wh. 1; Bank of United States *v.* Halstead, 10 Wh. 51; Hepburn

*v.* Griswold, 8 Wall. 603; National Bank *v.* Commonwealth, 9 Wall. 353; Thomson *v.* Pacific Railroad, 9 Wall. 579; Parker *v.* Davis, 12 Wall. 457; Railroad Company *v.* Johnson, 15 Wall. 195; Railroad Company *v.* Peniston, 18 Wall. 5; Legal Tender Case, 110 U. S. 421; In re Coy, 127 U. S. 731; Stoutenburgh *v.* Hennick, 129 U. S. 141; Chinese Ex. Case, 130 U. S. 581; In re Neagle, 135 U. S. 1; St. Paul, Minneapolis & Manitoba Ry. Co. *v.* Phelps, 137 U. S. 528; Horner *v.* United States, 143 U. S. 570; Logan *v.* United States, 144 U. S. 263; Fong Yue Ting *v.* United States, 149 U. S. 698; Lees *v.* United States, 150 U. S. 476; Luxton *v.* North River Bridge Co., 153 U. S. 529; Erie R. Rd. *v.* Pennsylvania, 153 U. S. 628; Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692; Clune *v.* United States, 159 U. S. 590; Motes *v.* United States, 178 U. S. 458; Buttfield *v.* Stranahan, 192 U. S. 470.

SECTION 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Dred Scott *v.* Sandford, 19 How. 393.

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

United States *v.* Hamilton, 3 Dall. 17; Hepburn et al. *v.* Ellzey, 2 Cr. 445; Ex parte Bollman and Swartwout, 4 Cr. 75; Ex parte Kearney, 7 Wh. 38; Ex parte Tobias Watkins, 3 Pet. 192; Ex parte Milburn, 9 Pet. 704; Holmes *v.* Jennison et al., 14 Pet. 540; Ex parte Dorr, 3 How. 103; Luther *v.* Borden, 7 How. 1; Ableman *v.* Booth and United States *v.* Booth, 21 How. 506; Ex parte Vallandigham, 1 Wall. 243; Ex parte Milligan, 4 Wall. 2; Ex parte McCardle, 7 Wall. 506; Ex parte Yerger, 8 Wall. 85; Tarble's Case, 13 Wall. 397; Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18; Ex parte Karstendick, 93 U. S. 396; Ex parte Virginia, 100 U. S. 339; In re Neagle, 135 U. S. 1; In re Duncan, 139 U. S. 449; In re Frederick, 149 U. S. 70; United States *v.* Sing Tuck, 194 U. S. 161; United States *v.* Ju Toy, 198 U. S. 253; Carfer *v.* Caldwell, 200 U. S. 293; McNichols *v.* Pease, 207 U. S. 100.

No Bill of Attainder or ex post facto Law shall be passed.

Fletcher *v.* Peck, 6 Cr. 87; Ogden *v.* Saunders, 12 Wh. 213; Watson et al. *v.* Mercer, 8 Pet. 88; Carpenter et al. *v.* Commonwealth of Pennsylvania, 17 How. 456; Locke *v.* New Orleans, 4 Wall. 172; Cummings *v.* The State of Missouri, 4 Wall. 277; Ex parte Garland, 4 Wall. 333; Drehman *v.* Stifle, 8 Wall. 595; Klinger *v.* State of Missouri, 13 Wall. 257; Pierce *v.* Carskadon, 16 Wall. 234; Holden *v.* Minnesota, 137 U. S. 483; Cook *v.* United States, 138 U. S. 157; Neely *v.* Henkel (No. 1), 180 U. S. 109; Southwestern Coal Co. *v.* McBride, 185 U. S. 499; Delamater *v.* South Dakota, 205 U. S. 93.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

License Tax Cases, 5 Wall. 462; Springer *v.* United States, 102

U. S. 586; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429; Nichols *v.* Ames, 173 U. S. 509; South Carolina *v.* United States, 199 U. S. 437.

No Tax or Duty shall be laid on Articles exported from any State.

Cooley *v.* Board of Wardens of Port of Philadelphia, 12 How. 299; Pace *v.* Burgess, collector, 92 U. S. 372; Turpin *v.* Burgess, 117 U. S. 504; Pittsburgh & Southern Coal Co. *v.* Bates, 156 U. S. 577; Nichols *v.* Ames, 173 U. S. 509; Williams *v.* Fears, 179 U. S. 270; De Lima *v.* Bidwell, 182 U. S. 1; Dooley *v.* United States, 183 U. S. 151; Fourteen Diamond Rings *v.* United States, 183 U. S. 176; Cornell *v.* Coyne, 192 U. S. 418; South Carolina *v.* United States, 199 U. S. 437; Armour Packing Co. *v.* United States, 209 U. S. 56.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How. 299; State of Pennsylvania *v.* Wheeling and Belmont Bridge Company et al., 18 How. 421; Munn *v.* Illinois, 94 U. S. 113; Packet Co. *v.* St. Louis, 100 U. S. 423; Packet Co. *v.* Catlettsburg, 105 U. S. 559; Morgan S. S. Co. *v.* La. Board of Health, 118 U. S. 455; Johnson *v.* Chicago & Pacific Elevator Co., 119 U. S. 388; South Carolina *v.* United States, 199 U. S. 437; Armour Packing Co. *v.* United States, 209 U. S. 56.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Calder and Wife *v.* Bull and Wife, 3 Dall. 386; Fletcher *v.* Peck, 6 Cr. 87; State of New Jersey *v.* Wilson, 7 Cr. 164; Sturgis *v.* Crowninshield, 4 Wh. 122; McMillan *v.* McNeil, 4 Wh. 209; Dartmouth College *v.* Woodward, 4 Wh. 518; Owings *v.* Speed, 5 Wh. 420; Farmers' and Mechanics' Bank *v.* Smith, 6 Wh. 131; Green et al. *v.* Biddle, 8 Wh. 1; Ogden *v.* Saunders, 12 Wh. 213; Mason *v.* Haile, 12 Wh. 370; Satterlee *v.* Matthewson, 2 Pet. 380; Hart *v.* Lamphire, 3 Pet. 280; Craig et al. *v.* State of Missouri, 4 Pet. 410; Providence Bank *v.* Billings and Pitman, 4 Pet. 514; Byrne *v.* State of Missouri, 8 Pet. 40; Watson *v.* Mercer, 8 Pet. 88; Mumma *v.* Potomac Company, 8 Pet. 281; Beers *v.* Haughton, 9 Pet. 329; Briscoe et al. *v.* The Bank of the Commonwealth of Kentucky, 11 Pet. 257; The Proprietors of Charles

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River Bridge *v.* The Proprietors of Warren Bridge, 11 Pet. 420; Armstrong *v.* The Treasurer of Athens Company, 16 Pet. 281; Bronson *v.* Kinzie et al., 1 How. 311; McCracken *v.* Hayward, 2 How. 608; Gordon *v.* Appeal Tax Court, 3 How. 133; State of Maryland *v.* Baltimore and Ohio R. R. Co., 3 How. 534; Neil, Moore & Co. *v.* State of Ohio, 3 How. 720; Cook *v.* Moffatt, 5 How. 295; Planters' Bank *v.* Sharp et al., 6 How. 301; West River Bridge Company *v.* Dix et al., 6 How. 507; Crawford et al. *v.* Branch Bank of Mobile, 7 How. 279; Woodruff *v.* Trapnall, 10 How. 190; Paup et al. *v.* Drew, 10 How. 218; Baltimore and Susquehanna R. R. Co. *v.* Nesbitt et al., 10 How. 395; Butler et al. *v.* Pennsylvania, 10 How. 402; Darrington et al. *v.* The Bank of Alabama, 13 How. 12; Richmond, etc., R. R. Co. *v.* The Louise R. R. Co., 13 How. 71; Trustees for Vincennes University *v.* State of Indiana, 14 How. 268; Curran *v.* State of Arkansas et al., 15 How. 304; State Bank of Ohio *v.* Knoop, 16 How. 369; Carpenter et al. *v.* Commonwealth of Pennsylvania, 17 How. 456; Dodge *v.* Woolsey, 18 How. 331; Beers *v.* State of Arkansas, 20 How. 527; Aspinwall et al. *v.* Commissioners of County of Daviess, 22 How. 364; Rector of Christ Church, Philadelphia *v.* County of Philadelphia, 24 How. 300; Howard *v.* Bugbee, 24 How. 461; Jefferson Branch Bank *v.* Skelley, 1 Black, 436; Franklin Branch Bank *v.* State of Ohio, 1 Black, 474; Trustees of the Wabash and Erie Canal Company *v.* Beers, 2 Black, 448; Gilman *v.* City of Sheboygan, 2 Black, 510; Bridge Proprietors *v.* Hoboken Company, 1 Wall. 116; Hawthorne *v.* Calef, 2 Wall. 10; The Binghamton Bridge, 3 Wall. 51; The Turnpike Company *v.* The State, 3 Wall. 210; Locke *v.* City of New Orleans, 4 Wall. 172; Railroad Company *v.* Rock, 4 Wall. 177; Cummings *v.* State of Missouri, 4 Wall. 277; Ex parte Garland, 4 Wall. 333; Von Hoffman *v.* City of Quincy, 4 Wall. 535; Mulligan *v.* Corbin, 7 Wall. 487; Furman *v.* Nichol, 8 Wall. 44; Home of the Friendless *v.* Rouse, 8 Wall. 430; The Washington University *v.* Rouse, 8 Wall. 439; Butz *v.* City of Muscatine, 8 Wall. 575; Drehman *v.* Stifle, 8 Wall. 595; Hepburn *v.* Griswold, 8 Wall. 603; Gut *v.* The State, 9 Wall. 35; Railroad Company *v.* McClure, 10 Wall. 511; Parker *v.* Davis, 12 Wall. 457; Curtis *v.* Whitney, 13 Wall. 68; Pennsylvania College Cases, 13 Wall. 190; Wilmington R. R. *v.* Reid, sheriff, 13 Wall. 264; Salt Company *v.* East Saginaw, 13 Wall. 373; White *v.* Hart, 13 Wall. 646; Osborn *v.* Nicholson et al., 13 Wall. 654; Railroad Company *v.* Johnson, 15 Wall. 195; Case of the State Tax on Foreign-held Bonds, 15 Wall. 300; Tomlinson *v.* Jessup, 15 Wall. 454; Tomlinson *v.* Branch, 15 Wall. 460; Miller *v.* The State, 15 Wall. 478; Holyoke Company *v.* Lyman, 15 Wall. 500; Gunn *v.* Barry, 15 Wall. 610; Humphrey *v.* Pegues, 16 Wall. 244; Walker *v.* Whitehead, 16 Wall. 314; Sohn *v.* Waterson, 17 Wall. 596; Baring *v.* Dabney, 19 Wall. 1; Head *v.* The University, 19 Wall. 526; Pacific R. R. Co. *v.* Maguire, 20 Wall. 36; Garrison *v.* The City of New York, 21 Wall. 196; Ochiltree *v.* The Railroad Company, 21 Wall. 249; Wilmington, &c., Railroad *v.* King, ex., 91 U. S. 3; County of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 U. S. 631; Home Insurance Company *v.* City Council of Augusta, 93 U. S. 116; West Wisconsin R. R. Co. *v.* Supervisors, 93 U. S. 595; Murray *v.* Charleston, 96 U. S. 432; Edwards *v.* Kearzey, 96 U. S. 595; Keith *v.* Clark, 97 U. S. 454; Railroad Co. *v.* Georgia, 98 U. S. 359; Railroad Co. *v.* Tennessee, 101 U. S. 337; Wright *v.* Nagle, 101 U. S. 791; Stone *v.* Mississippi, 101 U. S. 814; Railroad Co. *v.* Alabama, 101

U. S. 832; Louisiana *v.* New Orleans, 102 U. S. 203; Hall *v.* Wisconsin, 103 U. S. 5; Penniman's Case, 103 U. S. 714; Guaranty Co. *v.* Board of Liquidation, 105 U. S. 622; Greenwood *v.* Freight Co., 105 U. S. 13; Kring *v.* Missouri, 107 U. S. 221; Louisiana *v.* New Orleans, 109 U. S. 285; Gilfillan *v.* Union Canal Co., 109 U. S. 401; Nelson *v.* St. Martin's Parish, 111 U. S. 716; Chic. Life Ins. Co. *v.* Needles, 113 U. S. 574; Virginia Coupon Cases, 114 U. S. 269; Allen, Auditor, et al. *v.* Baltimore & Ohio R. R. Co., 114 U. S. 311; Amy *v.* Shelby Co., 114 U. S. 387; Effinger *v.* Kenney, 115 U. S. 566; N. Orleans Gas Co. *v.* La. Light Co., 115 U. S. 650; N. Orleans Water Works *v.* Rivers, 115 U. S. 674; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683; Fisk *v.* Jefferson Police Jury, 116 U. S. 131; Stone *v.* Farmers' Loan and Trust Co., 116 U. S. 307; Stone *v.* Ill. Central R. R. Co., 116 U. S. 347; Royall *v.* Virginia, 116 U. S. 572; St. Tammany Water Works *v.* N. Orleans Water Works, 120 U. S. 64; Church *v.* Kelsey, 121 U. S. 282; Lehigh Water Co. *v.* Easton, 121 U. S. 388; Seibert *v.* Lewis, 122 U. S. 284; N. Orleans Water Works *v.* La. Sugar Ref. Co., 125 U. S. 18; Maynard *v.* Hill, 125 U. S. 140; Jaehne *v.* N. Y., 128 U. S. 189; Denny *v.* Bennett, 128 U. S. 489; Chinese Ex. Case, 130 U. S. 588; Williamson *v.* N. J., 130 U. S. 189; Hunt *v.* Hunt, 131 U. S. clxv; Freeland *v.* Williams, 131 U. S. 405; Campbell *v.* Wade, 134 U. S. 34; Penna. R. Rd. Co. *v.* Miller, 132 U. S. 75; Hans *v.* Louisiana, 134 U. S. 1; North Carolina *v.* Temple, 134 U. S. 22; Crenshaw *v.* United States, 134 U. S. 99; Louisiana ex rel. The N. Y. Guaranty and Indemnity Co. *v.* Steele, 134 U. S. 280; Minneapolis Eastern Rwy. Co. *v.* Minnesota, 134 U. S. 467; Hill *v.* Merchants' Ins. Co., 134 U. S. 515; Medley, petitioner, 134 U. S. 160; Cherokee Nation *v.* Kansas Ry. Co., 135 U. S. 641; Virginia Coupon Cases, 135 U. S. 662; Mormon Church *v.* United States, 136 U. S. 1; Wheeler *v.* Jackson, 137 U. S. 245; Holden *v.* Minnesota, 137 U. S. 483; Sioux City Street Railway Co. *v.* Sioux City, 138 U. S. 98; Cook *v.* United States, 138 U. S. 157; Wheeling & Belmont Br. Co. *v.* Wheeling Br. Co., 138 U. S. 287; Cook County *v.* Calumet and Chicago Canal Co., 138 U. S. 635; Pennoyer *v.* McConnaughy, 140 U. S. 1; County Court *v.* U. S. ex rel. Hill, 139 U. S. 41; Scott *v.* Neely, 140 U. S. 106; Essex Public Road Board *v.* Shinkle, 140 U. S. 334; Stein *v.* Bienville Water Supply Co., 141 U. S. 67; Henderson Bridge Co. *v.* Henderson, 141 U. S. 679; New Orleans *v.* N. O. Water W'ks, 142 U. S. 79; Pacific Ex. Co. *v.* Seibert, 142 U. S. 339; N. O. City & Lake R. Rd. Co. *v.* New Orleans, 143 U. S. 192; Winona & St. Peter R. Rd. Co. *v.* Plainview, 143 U. S. 371; Louisville Water Co. *v.* Clark, 143 U. S. 1; N. Y. *v.* Squire, 145 U. S. 175; Brown *v.* Smart, 145 U. S. 454; Baker's Exrs. *v.* Kilgore, 145 U. S. 487; Morley *v.* Lake Shore & Mich. Southern Ry. Co., 146 U. S. 162; Wilmington & Weldon R. Rd. Co. *v.* Alsbrook, 146 U. S. 279; Butler *v.* Goreley, 146 U. S. 303; Ills. Cent. R. Rd. *v.* Ills., 146 U. S. 387; Hamilton Gas L't Co. *v.* Hamilton City, 146 U. S. 258; Bier *v.* McGehee, 148 U. S. 137; Schurz *v.* Cook, 148 U. S. 397; Eustis *v.* Bolles, 150 U. S. 361; Duncan *v.* Missouri, 152 U. S. 377; Israel *v.* Arthur, 152 U. S. 355; New Orleans *v.* Benjamin, 153 U. S. 411; Eagle Ins. Co. *v.* Ohio, 153 U. S. 446; Erie R. Rd. *v.* Penna., 153 U. S. 628; Mobile & Ohio R. Rd. *v.* Tenn., 153 U. S. 486; Pittsburgh & So. Coal Co. *v.* La., 156 U. S. 590; United States ex rel. Siegel *v.* Thoman, 156 U. S. 353; City and Lake R. Rd. *v.* N. O., 157 U. S. 219; Central Land Co. *v.* Laidley, 159 U. S. 103; Winona & St. Peter

Land Co. *v.* Minn., 159 U. S. 528; Bank of Commerce *v.* Tenn., 161 U. S. 134; Baltzer *v.* N. C., 161 U. S. 240; Woodruff *v.* Miss., 162 U. S. 291; Gibson *v.* Miss., 162 U. S. 565; Barnitz *v.* Beverly, 163 U. S. 118; Hanford *v.* Davies, 163 U. S. 273; Covington, &c., Turnpike Co. *v.* Sandford, 164 U. S. 578; St. Louis, &c., Ry. Co. *v.* Mathews, 165 U. S. 1; Allgeyer *v.* Louisiana, 165 U. S. 578; Water Power Co. *v.* Water Commissioners, 168 U. S. 349; Douglas *v.* Kentucky, 168 U. S. 488; Hawker *v.* New York, 170 U. S. 189; Galveston, &c., Ry. Co. *v.* Texas, 170 U. S. 226; Houston, &c., Ry. Co. *v.* Texas, 170 U.S. 243; Williams *v.* Eggleston, 170 U. S. 304; Thompson *v.* Utah, 170 U. S. 343; Chicago, &c., R. R. Co. *v.* Nebraska, 170 U. S. 57; Thompson *v.* Missouri, 171 U. S. 380; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1; McCollough *v.* Va., 172 U. S. 102; Covington *v.* Kentucky, 173 U. S. 231; Citizens' Savings Bank *v.* Owensboro, 173 U. S. 636; Walsh *v.* Columbus, &c., R. R. Co., 176 U. S. 469; Stearns *v.* Minn., 179 U. S. 223; McDonald *v.* Massachusetts, 180 U. S. 311; Mallett *v.* North Carolina, 181 U. S. 589; Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611; Reetz *v.* Michigan, 188 U. S. 505; Savannah, Thunderbolt, &c. Ry. *v.* Savannah, 198 U. S. 392; Knights of Pythias *v.* Meyer, 198 U. S. 508; Tampa Water Works *v.* Tampa, 199 U. S. 241; Manigault *v.* Springs, 199 U. S. 473; Metropolitan Street Ry. Co. *v.* Tax Comm'rs, 199 U. S. 1; Kies *v.* Lowrey, 199 U. S. 233; Graham *v.* Folsom, 200 U. S. 248; San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304; Water Company *v.* Knoxville, 200 U. S. 22; Gunter *v.* Atlantic Coast Line, 200 U. S. 273; Powers *v.* Detroit, & G. H. and M. Railway, 201 U. S. 543; Cleveland *v.* Cleveland Electric Railway, 201 U. S. 529; West Chicago Railroad *v.* Chicago, 201 U. S. 506; Blair *v.* Chicago, 201 U. S. 400; Devine *v.* Los Angeles, 202 U. S. 313; Vicksburg *v.* Waterworks Co., 202 U. S. 453; National Council *v.* State Council, 203 U. S. 151; Offield *v.* New York, New Haven and Hartford R. R. Co., 203 U. S. 372; American Smelting &c. Co. *v.* Colo., 204 U. S. 103; Cleveland Electric Railway Co. *v.* Cleveland, 204 U. S. 116; Rochester Railway Co. *v.* Vicksburg Waterworks Co., 206 U. S. 496; Bernheimer *v.* Converse, 206 U. S. 576; Sauer *v.* City of New York, 206 U. S. 536; Smith *v.* Jennings, 206 U. S. 276; Sullivan *v.* Texas, 207 U. S. 416; Hunter *v.* Pittsburg, 207 U. S. 161; Polk *v.* Mutual Reserve Fund Association, 207 U. S. 310; Felton *v.* University of the South, 208 U. S. 489; Northern Pacific Railway *v.* Duluth, 208 U. S. 583; Cosmopolitan Club *v.* Virginia, 208 U. S. 378; Hudson Water Co. *v.* McCarter, 209 U. S. 349; Yazoo & Mississippi Railroad Co. *v.* Vicksburg, 209 U. S. 358; St. Louis *v.* United Railways Co., 210 U. S. 266; Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86; Hammond Packing Co. *v.* Arkansas, 212 U. S. 322; Louisiana ex rel. Hubert *v.* New Orleans, 215 U. S. 170; Henly *v.* Myers, 215 U. S. 373; Minneapolis *v.* Minneapolis Street R. Co., 215 U. S. 417; Wright *v.* Georgia R. & Bkg. Co., 216 U. S. 420; Missouri P. R. Co. *v.* Kansas ex rel. Taylor, 216 U. S. 262; Citizens' Natl. Bank *v.* Kentucky, 217 U. S. 443; Griffith *v.* Connecticut, 218 U. S. 563; Calder *v.* Michigan, 218 U. S. 591; Arkansas S. R. Co. *v.* Louisiana, 218 U. S. 431; Moffitt *v.* Kelly, 218 U. S. 400.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the

Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

McCulloch *v.* State of Maryland, 4 Wh. 316; Gibbons *v.* Ogden, 9 Wh. 1; Brown *v.* The State of Maryland, 12 Wh. 419; Mager *v.* Grima et al., 8 How. 490; Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How. 299; Almy *v.* State of California, 24 How. 169; License Tax Cases, 5 Wall. 462; Crandall *v.* State of Nevada, 6 Wall. 35; Waring *v.* The Mayor, 8 Wall. 110; Woodruff *v.* Perham, 8 Wall. 123; Hinson *v.* Lott, 8 Wall. 148; State Tonnage Tax Cases, 12 Wall. 204; State Tax on Railway Gross Receipts, 15 Wall. 284; Inman Steamship Company *v.* Tinker, 94 U. S. 238; Cook *v.* Pennsylvania, 97 U. S. 566; Packet Co. *v.* Keokuk, 95 U. S. 80; People *v.* Compagnie Générale Transatlantique, 107 U. S. 59; Brown *v.* Houston, 114 U. S. 622; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S. 577; Pittsburgh & So. Coal Co. *v.* La., 156 U. S. 590; Patapsco Guano Co. *v.* N. C., 171 U. S. 345; May & Co. *v.* New Orleans, 178 U. S. 496; Dooley *v.* United States, 183 U. S. 151; Cornell *v.* Coyne, 192 U. S. 418; American Steel & Wire Co. *v.* Speed, 192 U. S. 500; Delaware, L., &c., R. R. Co. *v.* Pennsylvania, 198 U. S. 341; McLean *v.* Denver & Rio Grande R. R., 203 U. S. 38.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Green *v.* Biddle, 8 Wh. 1; Poole et al. *v.* The Lessee of Fleeger et al., 11 Pet. 185; Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How. 299; Peete *v.* Morgan, 19 Wall. 581; Cannon *v.* New Orleans, 20 Wall. 577; Inman Steamship Company *v.* Tinker, 94 U. S. 238; Packet Co. *v.* St. Louis, 100 U. S. 423; Packet Co. *v.* Keokuk, 95 U. S. 80; Vicksburg *v.* Tobin, 100 U. S. 430; Packet Co. *v.* Catlettsburg, 105 U. S. 559; Morgan Steamship Company *v.* Louisiana Board of Health, 118 U. S. 455; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; Huse *v.* Glover, 119 U. S. 543; Harmon *v.* Chicago, 147 U. S. 396; Va. *v.* Tenn., 148 U. S. 503; Wharton *v.* Wise, 153 U. S. 155; St. Louis and San Francisco Ry. Co. *v.* James, 161 U. S. 545.

## ARTICLE II

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows.

Field *v.* Clark, 143 U. S. 649.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative or Person holding an

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Office of Trust or Profit under the United States, shall be appointed an Elector.

Chisholm, ex., *v.* Georgia, 2 Dall. 419; Leitensdorfer et al. *v.* Webb, 20 How. 176; Ex parte Siebold, 100 U. S. 271; In re Green, 134 U. S. 377; McPherson *v.* Blacker, 146 U. S. 1.

[The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.][1]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

Inglis *v.* The Trustees of the Sailors' Snug Harbor, 3 Pet. 99.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice-President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice-President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Com-

[1] This clause has been superseded by the Twelfth Amendment.

pensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

United States *v.* Wilson, 7 Pet. 150; Ex parte William Wells, 18 How. 307; Ex parte Garland, 4 Wall. 333; Armstrong's Foundry, 6 Wall. 766; The Grape Shot, 9 Wall. 129; United States *v.* Padelford, 9 Wall 542; United States *v.* Klein, 13 Wall. 128; Armstrong *v.* The United States, 13 Wall. 152; Pargoud *v.* The United States, 13 Wall. 156; Hamilton *v.* Dillin, 21 Wall. 73; Mechanics' and Traders' Bank *v.* Union Bank, 22 Wall. 276; Lamar, ex., *v.* Browne et al., 92 U. S. 187; Wallach et al. *v.* Van Riswick, 92 U. S. 202; Eustis *v.* Bolles, 150 U. S. 361.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Ware *v.* Hylton et al., 3 Dall. 199; Marbury *v.* Madison, 1 Cr. 137; United States *v.* Kirkpatrick, 9 Wh. 720; American Insurance Company *v.* Canter (356 bales cotton), 1 Pet. 511; Foster and Elam *v.* Neilson, 2 Pet. 253; Cherokee Nation *v.* State of Georgia, 5 Pet. 1; Patterson *v.* Winn et al., 5 Pet. 233; Worcester *v.* State of Georgia, 6 Pet. 515; City of New Orleans *v.* De Armas et al., 9 Pet. 224; Holden *v.* Joy, 17 Wall. 211; Geofroy *v.* Riggs, 133 U. S. 258; Horner *v.* United States, 143 U. S. 570; Shoemaker *v.* United States, 147 U. S. 282; Parsons *v.* United States, 167 U. S. 324; Rice *v.* Ames, 180 U. S. 371; Fourteen Diamond Rings *v.* United States, 183 U. S. 176; Dorr *v.* United States, 195 U. S. 138.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The United States *v.* Kirkpatrick et al., 9 Wh. 720.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Marbury *v.* Madison, 1 Cr. 137; Kendall, Postmaster-General, *v.* The United States, 12 Pet. 524; Luther *v.* Borden, 7 How. 1; The State of Mississippi *v.* Johnson, President, 4 Wall. 475; Stewart *v.* Kahn, 11 Wall. 493; In re Neagle, 135 U. S. 1.

SECTION 4. The President, Vice-President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Langford *v.* United States, 101 U. S. 341.

## ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Chisholm, ex., *v.* Georgia, 2 Dall. 419; Stuart *v.* Laird, 1 Cr. 299; United States *v.* Peters, 5 Cr. 115; Martin *v.* Hunter's Lessee, 1 Wh. 304; Cohens *v.* Virginia, 6 Wh. 264; Osborn *v.* United States Bank, 9 Wh. 738; Benner et al. *v.* Porter, 9 How. 235; The United States *v.* Ritchie, 17 How. 525; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How. 272; Ex parte Vallandigham, 1 Wall. 243; Ames *v.* Kansas, 111 U. S. 449; In re Ross, 140 U. S. 453; McAllister *v.* United States, 141 U. S. 174; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429; Robertson *v.* Baldwin, 165 U. S. 275; Hanover National Bank *v.* Moyses, 186 U. S. 181; Turner *v.* Williams, 194 U. S. 279; Ex parte Wisner, 203 U. S. 449.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Contro-

versies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Hayburn's Case (note), 2 Dall. 410; Chisholm, ex., *v.* Georgia, 2 Dall. 419; Glass et al. *v.* Sloop Betsey, 3 Dall. 6; United States *v.* La Vengeance, 3 Dall. 297; Hollingsworth et al. *v.* Virginia, 3 Dall. 378; Mossman, ex., *v.* Higginson, 4 Dall. 12; Marbury *v.* Madison, 1 Cr. 137; Hepburn et al. *v.* Ellzey, 2 Cr. 444; United States *v.* More, 3 Cr. 159; Strawbridge et al. *v.* Curtiss et al., 3 Cr. 267; Ex parte Bollman and Swartwout, 4 Cr. 75; Rose *v.* Himely, 4 Cr. 241; Chappedelaine et al. *v.* Dechenaux, 4 Cr. 305; Hope Insurance Company *v.* Boardman et al., 5 Cr. 57; Bk. of United States *v.* Deveaux et al., 5 Cr. 61; Hodgson et al. *v.* Bowerbank et al., 5 Cr. 303; Owings *v.* Norwood's Lessee, 5 Cr. 344; Durousseau *v.* The United States, 6 Cr. 307; United States *v.* Hudson and Goodwin, 7 Cr. 32; Martin *v.* Hunter, 1 Wh. 304; Colson et al. *v.* Lewis, 2 Wh. 377; United States *v.* Bevans, 3 Wh. 336; Cohens *v.* Virginia, 6 Wh. 264; Ex parte Kearney, 7 Wh. 38; Matthews *v.* Zane, 7 Wh. 164; Osborn *v.* United States Bank, 9 Wh. 738; United States *v.* Ortega, 11 Wh. 467; American Insurance Company *v.* Canter (356 bales cotton), 1 Pet. 511; Jackson *v.* Twentyman, 2 Pet. 136; Cherokee Nation *v.* State of Georgia, 5 Pet. 1; State of New Jersey *v.* State of New York, 5 Pet. 283; Davis *v.* Packard et al., 6 Pet. 41; United States *v.* Arredondo et al., 6 Pet. 691; Davis *v.* Packard et al., 7 Pet. 276; Breedlove et al. *v.* Nicolet et al., 7 Pet. 413; Brown *v.* Keene, 8 Pet. 112; Davis *v.* Packard et al., 8 Pet. 312; City of New Orleans *v.* De Armas et al., 9 Pet. 224; The State of Rhode Island *v.* The Commonwealth of Massachusetts, 12 Pet. 657; The Bank of Augusta *v.* Earle, 13 Pet. 519; The Commercial and Railroad Bank of Vicksburg *v.* Slocomb et al., 14 Pet. 60; Suydam et al. *v.* Broadnax, 14 Pet. 67; Prigg *v.* The Commonwealth of Pennsylvania, 16 Pet. 530; Louisville, Cincinnati and Charleston Railway Company *v.* Letson, 2 How. 497; Cary et als. *v.* Curtis, 3 How. 236; Waring *v.* Clarke, 5 How. 441; Luther *v.* Borden, 7 How. 1; Sheldon et al. *v.* Sill, 8 How. 441; The Propeller Genesee Chief *v.* Fitzhugh et al., 12 How. 443; Fretz et al. *v.* Bull et al., 12 How. 466; Neves et al. *v.* Scott et al., 13 How. 268; State of Pennsylvania *v.* The Wheeling, etc., Bridge Company et al., 13 How. 518; Marshall *v.* The Baltimore and Ohio R. R. Co., 16 How. 314; The United States *v.* Guthrie, 17 How. 284; Smith *v.* State of Maryland, 18 How. 71; Jones et al. *v.* League, 18 How. 76; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How. 272; Hyde et al. *v.* Stone, 20 How. 170; Irvine *v.* Marshall et al., 20 How. 558; Fenn *v.* Holmes, 21 How. 481; Morewood et al. *v.* Enequist, 23 How. 491; Commonwealth of Kentucky *v.* Dennison, governor, 24 How. 66; Ohio and Mississippi Railroad Company *v.* Wheeler, 1 Black, 286; The Steamer Saint Lawrence, 1 Black, 522; The Propeller Commerce, 1 Black, 574; Ex parte Vallandigham, 1 Wall. 243; Ex parte Milligan, 4 Wall. 1; The Moses Taylor, 4 Wall. 411; State of Mississippi *v.* Johnson, President, 4 Wall. 475; The Hine *v.* Trevor, 4 Wall. 555; City of Philadelphia *v.* The Collector, 5 Wall. 720; State of Geor-

gia *v.* Stanton, 6 Wall. 50; Payne *v.* Hook, 7 Wall. 425; The Alicia, 7 Wall. 571; Ex parte Yerger, 8 Wall. 85; Insurance Company *v.* Dunham, 11 Wall. 1; Virginia *v.* West Virginia, 11 Wall. 39; Coal Company *v.* Blatchford, 11 Wall. 172; Railway Company *v.* Whitton's Adm., 13 Wall. 270; Tarble's Case, 13 Wall. 397; Blyew et al. *v.* The United States, 13 Wall. 581; Davis *v.* Gray, 16 Wall. 203; Case of the Sewing Machine Companies, 18 Wall. 353; Insurance Company *v.* Morse, 20 Wall. 445; Vannevar *v.* Bryant, 21 Wall. 41; The Lottawanna, 21 Wall. 558; Gaines *v.* Fuentes et al., 92 U. S. 10; Muller *v.* Dows, 94 U. S. 444; Doyle *v.* Continental Insurance Company, 94 U. S. 535; Tennessee *v.* Davis, 100 U. S. 257; Baldwin *v.* Franks, 120 U. S. 678; Barron *v.* Burnside, 121 U. S. 186; St. Louis, Iron Mountain and Southern Railway *v.* Vickers, 122 U. S. 360; Chinese Ex. Case, 130 U. S. 581; Brooks *v.* Missouri, 124 U. S. 394; New Orleans Water Works *v.* Louisiana Sugar Refining Co., 125 U. S. 18; Spencer *v.* Merchant, 125 U. S. 345; Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46; Felix *v.* Scharnweber, 125 U. S. 54; Hannibal and St. Joseph R. R. *v.* Missouri River Packet Co., 125 U. S. 260; Kreiger *v.* Shelby R. R. Co., 125 U. S. 39; Craig *v.* Leitensdorfer, 127 U. S., 764; Jones *v.* Craig, 127 U. S. 213; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265; United States *v.* Beebe, 127 U. S. 338; Chinese Ex. Case, 130 U. S. 581; Lincoln County *v.* Luning, 133 U. S. 529; Christian *v.* Atlantic & N. C. R. Rd. Co., 133 U. S. 233; Haus *v.* Louisiana, 134 U. S. 1; Louisiana ex rel. The N. Y. Guaranty & Indemnity Co. *v.* Steele, 134 U. S. 280; Jones *v.* United States, 137 U. S. 202; Manchester *v.* Mass., 139 U. S. 240; In re Ross, 140 U. S. 453; In re Garnett, 141 U. S. 1; United States *v.* Texas, 143 U. S. 621; Cooke *v.* Avery, 147 U. S. 375; S. Pac. Co. *v.* Denton, 146 U. S. 202; Lawton *v.* Steele, 152 U. S. 133; Interstate Com. Comsn. *v.* Brimson, 154 U. S. 447; Chappell *v.* United States, 160 U. S. 499; St. Louis, etc., Ry. Co. *v.* James, 161 U. S. 545; Hanford *v.* Davies, 163 U. S. 273; Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112; In re Lennon, 166 U. S. 548; Meyer *v.* Richmond, 172 U. S. 82; Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592; La Abra Silver Mining Co. *v.* United States, 175 U. S. 423; Louisiana *v.* Texas, 176 U. S. 1; Western Union Telegraph Co. *v.* Ann Arbor R. R. Co., 178 U. S. 239; Smith *v.* Reeves, 178 U. S. 436; Motes *v.* United States, 178 U. S. 458; Wiley *v.* Sinkler, 179 U. S. 58; Missouri *v.* Illinois, 180 U. S. 208; Eastern Bldg. Association *v.* Welling, 181 U. S. 47; Dooley *v.* United States, 182 U. S. 222; Tullock *v.* Mulvane, 184 U. S. 497; Patton *v.* Brady, 184 U. S. 608; Kansas *v.* Colorado, 185 U. S. 14; Swafford *v.* Templeton, 185 U. S. 487; Mobile Transportation Co. *v.* Mobile, 187 U. S. 479; Andrews *v.* Andrews, 188 U. S. 14; Hooker *v.* Los Angeles, 188 U. S. 314; Cummings *v.* Chicago, 188 U. S. 410; Schaefer *v.* Werling, 188 U. S. 516; The Roanoke, 189 U. S. 185; Detroit, &c., Ry. *v.* Osborn, 189 U. S. 383; Patterson *v.* Bark Eudora, 190 U. S. 169; Howard *v.* Fleming, 191 U. S. 126; Arbuckle *v.* Blackburn, 191 U. S. 405; Deposit Bank *v.* Frankfort, 191 U. S. 499; Spencer *v.* Duplan Silk Co., 191 U. S. 526; Wabash R. R. Co. *v.* Pearce, 192 U. S. 179; Rogers *v.* Alabama, 192 U. S. 226; South Dakota *v.* North Carolina, 192 U. S. 286; Bankers' Casualty Co. *v.* Minn. St. P., &c. Ry., 192 U. S. 371; Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397; Minnesota *v.* Northern Securities Co., 194 U. S. 48; Hooker *v.* Burr, 194 U. S. 415; Cleveland *v.* Cleveland City Ry. Co., 194 U. S. 517; Traction Company *v.* Mining

Co., 196 U. S. 239; Dawson *v.* Columbia Trust Co., 197 U. S. 178; Jacobson *v.* Massachusetts, 197 U. S. 11; Leonard *v.* Vicksburg, &c., R. R. Co., 198 U. S. 416; Farrell *v.* O'Brien, 199 U. S. 89; South Carolina *v.* United States, 199 U. S. 437; Carfer *v.* Caldwell, 200 U. S. 293; Security Mutual Life Ins. Co. *v.* Prewitt, 202 U. S. 246; Kansas *v.* United States, 204 U. S. 331; The Winnebago, 205 U. S. 354; Lee *v.* New Jersey, 207 U. S. 67; St. Louis & Iron Mountain Railway *v.* Taylor, 210 U. S. 281.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Chisholm, ex., *v.* Georgia, 2 Dall. 419; Wiscart et al. *v.* Dauchy, 3 Dall. 221; Marbury *v.* Madison, 1 Cr. 137; Durousseau et al. *v.* United States, 6 Cr. 307; Martin *v.* Hunter's Lessee, 1 Wh. 304; Cohens *v.* Virginia, 6 Wh. 234; Ex parte Kearney, 7 Wh. 38; Wayman *v.* Southard, 10 Wh. 1; Bank of the United States *v.* Halstead, 10 Wh. 51; United States *v.* Ortega, 11 Wh. 467; The Cherokee Nation *v.* the State of Georgia, 5 Pet. 1; Ex parte Crane et als., 5 Pet. 189; The State of New Jersey *v.* The State of New York, 5 Pet. 283; Ex parte Sibbald *v.* United States, 12 Pet. 488; The State of Rhode Island *v.* The State of Massachusetts, 12 Pet. 657; State of Pennsylvania *v.* the Wheeling, &c., Bridge Company, 13 How. 518; In re Kaine, 14 How. 103; Ableman *v.* Booth and United States *v.* Booth, 21 How. 506; Freeborn *v.* Smith, 2 Wall. 160; Ex parte McCardle, 6 Wall. 318; Ex parte McCardle, 7 Wall. 506; Ex parte Yerger, 8 Wall. 85; The Lucy, 8 Wall. 307; The Justices *v.* Murray, 9 Wall. 274; Pennsylvania *v.* Quicksilver Company, 10 Wall. 553; Murdock *v.* City of Memphis, 20 Wall. 590; The Francis Wright, 105 U. S. 381; Börs *v.* Preston, 111 U. S. 252; Ames *v.* Kansas, 111 U. S. 449; Clough *v.* Curtis, 134 U. S. 361; In re Neagle, 135 U. S. 1; Craig *v.* Leitensdorfer, 127 U. S. 764; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265; United States *v.* Texas, 143 U. S. 621; Mobile & Ohio R. Rd. *v.* Tenn., 153 U. S. 486; Woodruff *v.* Miss., 162 U. S. 291; McCullough *v.* Va., 172 U. S. 102; Louisiana *v.* Texas, 176 U. S. 1; Wilkes County *v.* Coler, 180 U. S. 506; W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452; Mallett *v.* North Carolina, 181 U. S. 589; United States *v.* Bitty, 208 U. S. 393.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Ex parte Milligan, 4 Wall. 2; Barton *v.* Barbour, 104 U. S. 126; Ex parte Wall., 107 U. S. 265; Callan *v.* Wilson, 127 U. S. 540; Nashville, Chattanooga, etc., Railway *v.* Alabama, 128 U. S. 96; Eilenbecker *v.* Plymouth County, 134 U. S. 31; Cook *v.* United States, 138 U. S. 157; In re Ross, 140 U. S. 453; Fong Yue Ting *v.*,United States, 149 U. S. 698; In re Debs, petitioner, 158 U. S. 564; Thompson *v.* Utah, 170

U. S. 343; Schick *v.* United States, 195 U. S. 65; Dorr *v.* United States, 195 U. S. 138; Matter of Strauss, 197 U. S. 324; Marvin *v.* Trout, 199 U. S. 212; Martin *v.* Texas, 200 U. S. 316; Tinsley *v.* Treat, 205 U. S. 20; Armour Packing Co. *v.* United States, 209 U. S. 56.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

United States *v.* The Insurgents, 2 Dall. 335; United States *v.* Mitchell, 2 Dall. 348; Ex parte Bollman and Swartwout, 4 Cr. 75; United States *v.* Aaron Burr, 4 Cr. 470.

The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Bigelow *v.* Forest, 9 Wall. 339; Day *v.* Micou, 18 Wall. 156; Ex parte Lange, 18 Wall. 163; Wallach et al. *v.* Van Riswick, 92 U. S. 202.

## ARTICLE IV

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Mills *v.* Duryee, 7 Cr. 481; Hampton *v.* McConnel, 3 Wh. 234; Mayhew *v.* Thatcher, 6 Wh. 129; Darby's Lessee *v.* Mayer, 10 Wh. 465; The United States *v.* Amedy, 11 Wh. 392; Caldwell et al. *v.* Carrington's Heirs, 9 Pet. 86; M'Elmoyle *v.* Cohen, 13 Pet. 312; The Bank of Augusta *v.* Earle, 13 Pet. 519; Bank of the State of Alabama *v.* Dalton, 9 How. 522; D'Arcy *v.* Ketchum, 11 How. 165; Christmas *v.* Russell, 5 Wall. 290; Green *v.* Van Buskirk, 7 Wall. 139; Paul *v.* Virginia, 8 Wall. 168; Board of Public Works *v.* Columbia College, 17 Wall. 521; Thompson *v.* Whitman, 18 Wall. 457; Bonaparte *v.* Tax Court, 104 U. S. 592; Robertson *v.* Pickrell, 109 U. S. 608; Brown et al. *v.* Houston, Collector, et al., 114 U. S. 622; Hanley *v.* Donoghue, 116 U. S. 1; Renaud *v.* Abbott, 116 U. S. 277; Chic. and Alton R. R. *v.* Wiggins Ferry Co., 119 U. S. 615; Cole *v.* Cunningham, 133 U. S. 107; Blount *v.* Walker, 134 U. S. 607; Texas & Pacific Ry. Co. *v.* Southern Pacific Co., 137 U. S. 48; Simmons *v.* Saul, 138 U. S. 439; Reynolds *v.* Stockton, 140 U. S. 254; Carpenter *v.* Strange, 141 U. S. 87; Glenn *v.* Garth, 147 U. S. 360; Huntington *v.* Attrill, 146 U. S. 657; Laing *v.* Rigney, 160 U. S. 531; Chicago, &c., Ry. Co. *v.* Sturm, 174 U. S. 710; Thormann *v.* Frame, 176 U. S. 350; Hancock Ntl. Bank *v.* Farnum, 176 U. S. 640; Clarke *v.* Clarke, 178 U. S. 186; Wilkes County *v.* Coler, 180 U. S. 506; W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452; Johnson *v.* New York Life Ins. Co., 187 U. S. 491; Andrews *v.* Andrews, 188 U. S. 14; Blackstone *v.* Miller, 188 U. S. 189; Finney *v.* Guy, 189 U. S. 335; Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S.

373; Wabash R. R. Co. *v.* Flannigan, 192 U. S. 29; German Savings Society *v.* Dormitzer, 192 U. S. 125; Wedding *v.* Meyler, 192 U. S. 573; National Mutual Bldg. & Loan Ass. *v.* Brahan, 193 U. S. 635; Minnesota *v.* Northern Securities Co., 194 U. S. 48; National Exchange Bank *v.* Wiley, 195 U. S. 257; Jaster *v.* Currie, 198 U. S. 144; Harding *v.* Harding, 198 U. S. 317; Harris *v.* Balk, 198 U. S. 215; Louisville & Nashville R. R. *v.* Deer, 200 U. S. 176; Haddock *v.* Haddock, 201 U. S. 562; Northern Assurance Co. *v.* Grand View Building Association, 203 U. S. 106; Wetmore *v.* Karrick, 205 U. S. 141; Old Wayne Life Association *v.* McDonough, 204 U. S. 8; Tilt *v.* Kelsey, 207 U. S. 43; Brown *v.* Fletcher's Estate, 210 U. S. 82; Fauntleroy *v.* Lun, 210 U. S. 230.

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Bank of United States *v.* Deveaux, 5 Cr. 61; Gassies *v.* Ballou, 6 Pet. 761; The State of Rhode Island *v.* The Commonwealth of Massachusetts, 12 Pet. 657; The Bank of Augusta *v.* Earle, 13 Pet. 519; Moore *v.* The People of the State of Illinois, 14 How. 13; Conner et al. *v.* Eliot et al., 18 How. 591; Dred Scott *v.* Sandford, 19 How. 393; Crandall *v.* State of Nevada, 6 Wall. 35; Woodruff *v.* Parham, 8 Wall. 123; Paul *v.* Virginia, 8 Wall. 168; Downham *v.* Alexandria Council, 10 Wall. 173; Liverpool Insurance Company *v.* Massachusetts, 10 Wall. 566; Ward *v.* Maryland, 12 Wall. 418; Slaughterhouse Cases, 16 Wall. 36; Bradwell *v.* The State, 16 Wall. 130; Chemung Bank *v.* Lowery, 93 U. S. 72; McCready *v.* Virginia, 94 U. S. 391; Brown *v.* Houston, 114 U. S. 622; Pembina Mining Co. *v.* Penna., 125 U. S. 181; Kimmish *v.* Ball, 129 U. S. 217; Cole *v.* Cunningham, 133 U. S. 107; Leisy *v.* Hardin, 135 U. S. 100; Minnesota *v.* Barber, 136 U. S. 313; McKane *v.* Durston, 153 U. S. 684; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S. 577; Blake *v.* McClung, 172 U. S. 239; Blake *v.* McClung, 176 U. S. 59; Sully *v.* Am. Ntl. Bank, 178 U. S. 289; Reymann Brewing Co. *v.* Brister, 179 U. S. 445; Williams *v.* Fears, 179 U. S. 270; Travellers Insurance Co. *v.* Connecticut, 185 U. S. 364; Chadwick *v.* Kelley, 187 U. S. 540; Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611; Blackstone *v.* Miller, 188 U. S. 189; Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373; Chambers *v.* Baltimore and Ohio Railroad Co., 207 U. S. 142; Hudson Water Co. *v.* McCarter, 209 U. S. 349.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Holmes *v.* Jennison et al., 14 Pet. 540; Commonwealth of Kentucky *v.* Dennison, governor, 24 How. 66; Taylor *v.* Taintor, 16 Wall. 366; Carroll County *v.* Smith, 111 U. S. 556; Ex parte Reggel, 114 U. S. 642; Mahon *v.* Justice, 127 U. S. 700; Lascelles *v.* Georgia, 148 U. S. 537; Pearce *v.* Texas, 155 U. S. 311; Utter *v.* Franklin, 172 U. S. 416; Munsey *v.* Clough, 196 U. S. 364; Appleyard *v.* Massachusetts, 203 U. S. 222; Pettibone *v.* Nichols, 203 U. S. 192; McNichols *v.* Pease, 207 U. S. 100; Bassing *v.* Cady, 208 U. S. 386; Pierce *v.* Creecy, 210 U. S. 387.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Prigg *v.* The Commonwealth of Pennsylvania, 16 Pet. 539; Jones *v.* Van Zandt, 5 How. 215; Strader et al. *v.* Graham, 10 How. 82; Moore *v.* The People of the State of Illinois, 14 How. 13; Dred Scott *v.* Sandford, 19 How. 393; Ableman *v.* Booth and United States *v.* Booth, 21 How. 506; Callan *v.* Wilson, 127 U. S. 540; Nashville, Chattanooga, etc., Rwy. *v.* Alabama, 128 U. S. 96.

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

American Insurance Company et al. *v.* Canter (356 bales cotton), 1 Pet. 511; Pollard's Lessee *v.* Hagan, 3 How. 212; Cross et al. *v.* Harrison, 16 How. 164; Benson *v.* United States, 146 U. S. 325; Ward *v.* Race Horse, 163 U. S. 504; Bolln *v.* Nebraska, 176 U. S. 83; Louisiana *v.* Mississippi, 202 U. S. 1.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

McCulloch *v.* State of Maryland, 4 Wh. 316; American Insurance Company *v.* Canter, 1 Pet. 511; United States *v.* Gratiot et al., 14 Pet. 526; United States *v.* Rogers, 4 How. 567; Cross et al. *v.* Harrison, 16 How. 164; Mackey et al. *v.* Coxe, 18 How. 100; Gibson *v.* Chouteau, 13 Wall. 92; Clinton *v.* Englebert, 13 Wall. 434; Beall *v.* New Mexico, 16 Wall. 535; Davis *v.* Beason, 133 U. S. 333; Wisconsin Central R. Rd. Co. *v.* Price County, 133 U. S. 496; Cope *v.* Cope, 137 U. S. 682; Mormon Church *v.* United States, 136 U. S. 1; Jones *v.* United States, 137 U. S. 202; St. Paul, Minneapolis, etc., Railway Co. *v.* Phelps, 137 U. S. 528; Talton *v.* Mayes, 163 U. S. 376; American Publishing Co. *v.* Fisher, 166 U. S. 464; Camfield *v.* United States, 167 U. S. 518; Thompson *v.* Utah, 170 U. S. 343; Green Bay & Mississippi Canal Co. *v.* Patten Paper Co., 173 U. S. 179; Neely *v.* Henkel (No. 1), 180 U. S. 109; De Lima *v.* Bidwell, 182 U. S. 1; Dooley *v.* United States, 182 U. S. 222; Downes *v.* Bidwell, 182 U. S. 244; Fourteen Diamond Rings *v.* United States, 183 U. S. 176; Hawaii *v.* Mankichi, 190 U. S. 197; Binns *v.* United States, 194 U. S. 486; Dorr *v.* United States, 195 U. S. 138; Rassmussen *v.* United States, 197 U. S. 516; United States *v.* Heinszen, 206 U. S. 370; Grafton *v.* United States, 206 U. S. 333; Ponce *v.* Roman Catholic Church, 210 U. S. 296.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of

them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Luther *v.* Borden, 7 How. 1; Texas *v.* White, 7 Wall. 700; In re Duncan, 139 U. S. 449; Taylor et al. *v.* Beckham (No. 1), 178 U. S. 548; South Carolina *v.* United States, 199 U. S. 437.

### ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One Thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

Hollingsworth et al. *v.* Virginia, 3 Dall. 378.

### ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Hayburn's Case, 2 Dall. 409; Ware *v.* Hylton, 3 Dall. 199; Calder and Wife *v.* Bull and Wife, 3 Dall. 386; Marbury *v.* Madison, 1 Cr. 137; Chirac *v.* Chirac, 2 Wh. 259; McCulloch *v.* The State of Maryland, 4 Wh. 316; Society *v.* New Haven, 8 Wh. 464; Gibbons *v.* Ogden, 9 Wh. 1; Foster and Elam *v.* Neilson, 2 Pet. 253; Buckner *v.* Finley, 2 Pet. 586; Worcester *v.* State of Georgia, 6 Pet. 515; Kennett et al. *v.* Chambers, 14 How. 38; Dodge *v.* Woolsey, 18 How. 331; State of New York *v.* Dibble, 21 How. 366; Ableman *v.* Booth and United States *v.* Booth, 21 How. 506; Sinnot *v.* Davenport, 22 How. 227; Foster *v.* Davenport, 22 How. 244; Haver *v.* Yaker, 9 Wall. 32; Whitney *v.* Robertson, 124 U. S. 190; In re Neagle, 135 U. S. 1; Horner *v.* United States, 143 U. S. 570; Fong Yue Ting *v.* United States, 149 U. S. 698; Cherokee Nation *v.* Kansas Ry. Co., 135 U. S. 641; Cook Co. *v.* Calumet & Chicago Canal Co., 138 U. S. 635; Gulf, Colorado & Santa Fé Rwy. Co. *v.* Hefley, 158 U. S. 98; In re Quarles and Butler, 158 U. S. 532; Ward *v.* Race Horse,

163 U. S. 504; McClellan *v.* Chipman, 164 U. S. 347; Smyth *v.* Ames, 169 U. S. 466; Missouri, Kansas & Texas Railway Co. *v.* Haber, 169 U. S. 613; Ohio *v.* Thomas, 173 U. S. 276; Lone Wolf *v.* Hitchcock, 187 U. S. 553; South Carolina *v.* United States, 199 U. S. 437.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Ex parte Garland, 4 Wall. 333; Davis *v.* Beason, 133 U. S. 333; Mormon Church *v.* United States, 136 U. S. 1.

### ARTICLE VII

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In Witness whereof We have hereunto subscribed our Names,

Go WASHINGTON
*Presidt. and deputy from Virginia.*

*New Hampshire*

John Langdon — Nicholas Gilman

*Massachusetts*

Nathaniel Gorham — Rufus King

*Connecticut*

Wm. Saml. Johnson — Roger Sherman

*New York*

Alexander Hamilton

*New Jersey*

Wil: Livingston — Wm. Paterson
David Brearley — Jona: Dayton

*Pennsylvania*

B. Franklin — Thomas Mifflin
Robt. Morris — Geo. Clymer
Thos. Fitzsimons — Jared Ingersoll
James Wilson — Gouv. Morris

*Delaware*

GEO. READ — GUNNING BEDFORD, jun
JOHN DICKINSON — RICHARD BASSETT
JACO: BROOM

*Maryland*

JAMES MCHENRY — DAN OF ST. THOS. JENIFER
DANL. CARROLL

*Virginia*

JOHN BLAIR — JAMES MADISON, Jr.

*North Carolina*

WM. BLOUNT — RICHD DOBBS SPAIGHT
HU. WILLIAMSON

*South Carolina*

J. RUTLEDGE — CHARLES COTESWORTH PINCKNEY
CHARLES PINCKNEY — PIERCE BUTLER

*Georgia*

WILLIAM FEW — ABR. BALDWIN

Attest: WILLIAM JACKSON, *Secretary.*

## ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

Eilenbecker *v.* Plymouth County, 134 U. S. 3.

### [ARTICLE I] [1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

[1] The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the First Congress, on the 25th of September, 1789. They were ratified by the following States, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ratified them.

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Terret et al. *v.* Taylor et al., 9 Cr. 43; Vidal et al. *v.* Girard et al., 2 How. 127; Ex parte Garland, 4 Wall. 333; United States *v.* Cruikshank et al., 92 U. S. 542; Reynolds *v.* United States, 98 U. S. 145; Davis *v.* Beason, 133 U. S. 333; In re Rapier, 143 U. S. 110; Horner *v.* United States, 143 U. S. 192; Bradfield *v.* Roberts, 175 U. S. 291; Turner *v.* Williams, 194 U. S. 279; Jack *v.* Kansas, 199 U. S. 372; Quick Bear *v.* Leupp, 210 U. S. 50.

[ARTICLE II]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Presser *v.* Illinois, 116 U. S. 252; Spies *v.* Illinois, 123 U. S. 131; Eilenbecker *v.* Plymouth County, 134 U. S. 31; Jack *v.* Kansas, 199 U. S. 372.

[ARTICLE III]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Smith *v.* State of Maryland, 18 How. 71; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How. 272; Ex parte Milligan, 4 Wall. 2; Boyd *v.* United States, 116 U. S. 616; Spies *v.* Illinois, 123 U. S. 131; Eilenbecker *v.* Plymouth County, 134 U. S. 31; Fong Yue Ting *v.* United States, 149 U. S. 698; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447; In re Chapman, 166 U. S. 661; Adams *v.* New York, 192 U. S. 585; Morris *v.* Hitchcock, 194 U. S. 384; Public Clearing House *v.* Coyne, 194 U. S. 497; Interstate Commerce Commission *v.* Baird, 194 U. S. 25; Jack *v.* Kansas, 199 U. S. 372; Hale *v.* Henkel, 201 U. S. 43; Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541; American Tobacco Co. *v.* Werckmeiser, 207 U. S. 284.

[ARTICLE V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

law; nor shall private property be taken for public use, without just compensation. APPENDIX XX

United States *v.* Perez, 9 Wh. 579; Barron *v.* The City of Baltimore, 7 Pet. 243; Fox *v.* Ohio, 5 How. 410; West River Bridge Company *v.* Dix et al., 6 How. 507; Mitchell *v.* Harmony, 13 How. 115; Moore, ex., *v.* The People of the State of Illinois, 14 How. 13; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How. 272; Dynes *v.* Hoover, 20 How. 65; Withers *v.* Buckley et al., 20 How. 84; Gilman *v.* The City of Sheboygan, 2 Black, 510; Ex parte Milligan, 4 Wall. 2; Twitchell *v.* The Commonwealth, 7 Wall. 321; Hepburn *v.* Griswold, 8 Wall. 603; Miller *v.* United States, 11 Wall. 268; Legal Tender Cases, 12 Wall. 457; Pumpelly *v.* Green Bay Company, 13 Wall. 166; Osborn *v.* Nicholson, 13 Wall. 654; Ex parte Lange, 18 Wall 163; Kohl et al. *v.* United States, 91 U. S. 367; Cole *v.* La Grange, 113 U. S. 1; Ex parte Wilson, 114 U. S. 417; Brown *v.* Grant, 116 U. S. 207; Boyd *v.* United States, 116 U. S. 616; Mackin *v.* United States, 117 U. S. 348; Ex parte Bain, 121 U. S. 1; Parkinson *v.* United States, 121 U. S. 281; Spies *v.* Illinois, 123 U. S. 131; Sands *v.* Manistee River Improvement Company, 123 U. S. 288; Mugler *v.* Kansas, 123 U. S. 623; Great Falls Manufacturing Company *v.* The Attorney-General, 124 U. S. 581; United States *v.* De Walt, 128 U. S. 393; Huling *v.* Kaw Valley Railway and Improvement Company, 130 U. S. 559; Freeland *v.* Williams, 131 U. S. 405; Cross *v.* North Carolina, 132 U. S. 131; Manning *v.* French, 133 U. S. 186; Searle *v.* School Dist. No. 2, 133 U. S. 553; Palmer *v.* McMahon, 133 U. S. 660; Eilenbecker *v.* Plymouth County, 134 U. S. 31; Chic., Mil. & St. Paul Rwy. Co. *v.* Minnesota, 134 U. S. 418; Wheeler *v.* Jackson, 137 U. S. 245; Holden *v.* Minnesota, 137 U. S. 245; Caldwell *v.* Texas, 137 U. S. 692; Cherokee Nation *v.* Kansas Ry. Co., 135 U. S. 641; Kaukauna Water Power Co. *v.* Miss. Canal Co., 142 U. S. 254; New Orleans *v.* N. O. Water W'ks, 142 U. S. 79; Counselman *v.* Hitchcock, 142 U. S. 547; Simmonds *v.* United States, 142 U. S. 148; Horn Silver Mining Co. *v.* N. Y., 143 U. S. 305; Hallinger *v.* Davis, 146 U. S. 314; Shoemaker *v.* United States, 147 U. S. 282; Thorington *v.* Montgomery, 147 U. S. 490; Yesler *v.* Wash'n Harbor Line Coms'rs, 146 U. S. 646; Monongahela Nav. Co. *v.* United States, 148 U. S. 312; Fong Yue Ting *v.* United States, 149 U. S. 698; In re Lennon, 150 U. S. 393; Pitts. C., C. & St. L. *v.* Backus, 154 U. S. 421; Interstate Com. Comsn. *v.* Brimson, 154 U. S. 447; Pearce *v.* Texas, 155 U. S. 311; Linford *v.* Ellison, 155 U. S. 503; Andrews *v.* Swartz, 156 U. S. 272; Pittsburgh & Southern Coal Co. *v.* La., 156 U. S. 590; St. L. & S. F. Rwy. Co. *v.* Gill, 156 U. S. 649; Johnson *v.* Sayre, 158 U. S. 109; Sweet *v.* Rechel, 159 U. S. 380; Brown *v.* Walker, 161 U. S. 591; Wong Wing *v.* United States, 163 U. S. 228; Talton *v.* Mayes, 163 U. S. 376; Robertson *v.* Baldwin, 165 U. S. 275; Bauman *v.* Ross, 167 U. S. 548; Wilson *v.* Lambert, 168 U. S. 611; Tinsley *v.* Anderson, 171 U. S. 101; Green Bay &c. Canal Co. *v.* Patten Paper Co., 172 U. S. 58; Norwood *v.* Baker, 172 U. S. 269; Scranton *v.* Wheeler, 179 U. S. 141; French *v.* Barber Asphalt Paving Co., 181 U. S. 324; Wight *v.* Davidson, 181 U. S. 371; Tonawanda *v.* Lyon, 181 U. S. 389; Capital City Dairy Co. *v.* Ohio, 183 U. S. 238; Hanover National Bank *v.* Moyses, 186 U. S. 181; Dreyer *v.* Illinois, 187 U. S. 71; Lone Wolf *v.* Hitchcock, 187 U. S. 553; United States *v.* Lynah, 188 U. S. 445; The Japanese Immigrant Case, 189 U. S. 86; Hawaii *v.* Monkichi, 190 U. S. 197; Bedford *v.* United

States, 192 U. S. 217; Buttfield *v.* Stranahan, 192 U. S. 470; Adams *v.* New York, 192 U. S. 585; Minneapolis & St. Louis R. R. Co. *v.* Minnesota, 193 U. S. 53; Beavers *v.* Henkel, 194 U. S. 73; Morris *v.* Hitchcock, 194 U. S. 384; Lloyd *v.* Dallison, 194 U. S. 445; Public Clearing House *v.* Coyne, 194 U. S. 497; Turner *v.* Williams, 194 U. S. 279; Shepard *v.* Barron, 194 U. S. 553; Interstate Commerce Commission *v.* Baird, 194 U. S. 25; Kepner *v.* United States, 195 U. S. 100; McCray *v.* United States, 195 U. S. 27; Rassmussen *v.* United States, 197 U. S. 516; United States *v.* Ju Toy, 198 U. S. 253; Jack *v.* Kansas, 199 U. S. 372; South Carolina *v.* United States, 199 U. S. 437; Trono *v.* United States, 199 U. S. 521; Chicago, B. & Q. Ry. Co. *v.* Drainage Commissioners, 200 U. S. 561; Southern Pacific R. R. Co. *v.* United States, 200 U. S. 341; Howard *v.* Kentucky, 200 U. S. 164; Hale *v.* Henkel, 201 U. S. 43; McAlister *v.* Henkel, 201 U. S. 90; Nelson *v.* United States, 201 U. S. 92; Sawyer *v.* United States, 202 U. S. 150; Matter of Moran, 203 U. S. 96; Union Bridge Co. *v.* United States, 204 U. S. 364; Martin *v.* District of Columbia, 205 U. S. 135; Barrington *v.* Missouri, 205 U. S. 483; United States *v.* Heinszen, 206 U. S. 370; Ellis *v.* United States, 206 U. S. 246; Grafton *v.* United States, 206 U. S. 333; Hunter *v.* Pittsburgh, 207 U. S. 161; Taylor *v.* United States, 207 U. S. 120; Shoener *v.* Pennsylvania, 207 U. S. 188; Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541; American Tobacco Co. *v.* Werckmeister, 207 U. S. 284; Adair *v.* United States, 204 U. S. 161; Bassing *v.* Cady, 208 U. S. 386; Twining *v.* New Jersey, 211 U. S. 78; United States ex rel. Atty. Gen. *v.* Delaware & H. Co., 213 U. S. 366.

[ARTICLE VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence.

United States *v.* Cooledge, 1 Wh. 415; Ex parte Kearney, 7 Wh. 38; United States *v.* Mills, 7 Pet. 142; Barron *v.* City of Baltimore, 7 Pet. 243; Fox *v.* Ohio, 5 How. 410; Withers *v.* Buckley et al., 20 How. 84; Ex parte Milligan, 4 Wall. 2; Twitchell *v.* The Commonwealth, 7 Wall. 321; Miller *v.* The United States, 11 Wall. 268; United States *v.* Cook, 17 Wall. 168; United States *v.* Cruikshank et al., 92 U. S. 542; Spies *v.* Illinois, 123 U. S. 131; Eilenbecker *v.* Plymouth Co., 134 U. S. 31; Jones *v.* United States, 137 U. S. 202; Cook *v.* United States, 138 U. S. 157; In re Ross, 140 U. S. 453; Hallinger *v.* Davis, 146 U. S. 314; Mattox *v.* United States, 156 U. S. 237; Bergemann *v.* Becker, 157 U. S. 655; Rosen *v.* United States, 161 U. S. 29; United States *v.* Zucker, 161 U. S. 475; Wong Wing *v.* United States, 163 U. S. 228; Motes *v.* United States, 178 U. S. 458; Fidelity and Deposit Co. *v.* United States, 187 U. S. 315; Hawaii *v.* Mankichi, 190 U. S. 197; Lloyd *v.* Dallison, 194 U. S. 445; West *v.* Louisiana, 194 U. S. 258; Turner *v.* Williams, 194 U. S. 279; Schick *v.* United States, 195 U. S. 65; Dorr *v.* United States, 195 U. S. 138; Rassmussen *v.* United States, 197 U. S. 516; Beavers *v.* Haubert, 198 U. S. 77; Marvin *v.* Trout, 199 U. S. 212; Jack *v.* Kansas,

199 U. S. 372; Martin *v.* Texas, 200 U. S. 316; Howard *v.* Kentucky, 200 U. S. 164; Sawyer *v.* United States, 202 U. S. 150; Tinsley *v.* Treat, 205 U. S. 20; Ughbanks *v.* Armstrong, 208 U. S. 481; Armour Packing Co. *v.* United States, 209 U. S. 56.

[ARTICLE VII]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reëxamined in any Court of the United States, than according to the rules of the common law.

United States *v.* La Vengeance, 3 Dall. 297; Bank of Columbia *v.* Okely, 4 Wh. 235; Parsons *v.* Bedford et al., 3 Pet. 433; Lessee of Livingston *v.* Moore et al., 7 Pet. 469; Webster *v.* Reid, 11 How. 437; State of Pennsylvania *v.* The Wheeling, &c., Bridge Company et al., 13 How. 518; The Justices *v.* Murray, 9 Wall. 274; Edwards *v.* Elliott et al., 21 Wall. 532; Pearson *v.* Yewdall, 95 U. S. 294; McElrath *v.* United States, 102 U. S. 426; Callan *v.* Wilson, 127 U. S. 540; Ark. Valley Land and Cattle Co. *v.* Mann, 130 U. S. 69; Whitehead *v.* Shattuck, 138 U. S. 146; Scott *v.* Neely, 140 U. S. 106; Cates *v.* Allen, 149 U. S. 451; Fong Yue Ting *v.* United States, 149 U. S. 698; Chappell *v.* United States, 160 U. S. 499; Coughran *v.* Bigelow, 164 U. S. 301; Walker *v.* New Mexico & Southern Pacific Railroad, 165 U. S. 593; Chicago, Burlington & Quincy *v.* Chicago, 166 U. S. 226; American Pub. Co. *v.* Fisher, 166 U. S. 464; Guthrie Ntl. Bank *v.* Guthrie, 173 U. S. 528; Rassmussen *v.* United States, 197 U. S. 516; Marvin *v.* Trout, 199 U. S. 212; Jack *v.* Kansas, 199 U. S. 372; Fidelity Mutual Life Ins. Co. *v.* Clark, 203 U. S. 64.

[ARTICLE VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Pervear *v.* Commonwealth, 5 Wall. 475; Manning *v.* French, 133 U. S. 186; Eilenbecker *v.* Plymouth County, 134 U. S. 31; In re Kemmler, 136 U. S. 436; McElvaine *v.* Brush, 142 U. S. 155; O'Neill *v.* Vermont, 144 U. S. 323; McDonald *v.* Massachusetts, 180 U. S. 311; Jack *v.* Kansas, 199 U. S. 372; Ughbanks *v.* Armstrong, 208 U. S. 481.

[ARTICLE IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Lessee of Livingston *v.* Moore et al., 7 Pet. 469.

[ARTICLE X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Chisholm, ex., *v.* State of Georgia, 2 Dall. 419; Hollingsworth et al.

*v.* The State of Virginia, 3 Dall. 378; Martin *v.* Hunter's Lessee, 1 Wh. 304; McCulloch *v.* State of Maryland, 4 Wh. 316; Anderson *v.* Dunn, 6 Wh. 204; Cohens *v.* Virginia, 6 Wh. 264; Osborn *v.* United States Bank, 9 Wh. 738; Buckner *v.* Finley, 2 Pet. 586; Ableman *v.* Booth, 21 How. 506; The Collector *v.* Day, 11 Wall. 113; Claflin *v.* Houseman, assignee, 93 U. S. 130; Inman Steamship Company *v.* Tinker, 94 U. S. 238; Church *v.* Kelsey, 121 U. S. 282; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; W. U. Tel. Co. *v.* Pendleton, 122 U. S. 347; Bowman *v.* Chicago and Northwestern Rwy Co., 125 U. S. 465; Mahon *v.* Justice, 127 U. S. 700; Leisy *v.* Hardin, 135 U. S. 100; Manchester *v.* Mass., 139 U. S. 240; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429; Forsyth *v.* Hammond, 166 U. S. 506; St. Anthony Falls Water Power Co. *v.* St. Paul Water Commissioners, 168 U. S. 349; Missouri Kansas & Texas Railway Co. *v.* Haber, 169 U. S. 613; Hancock Mutual Life Ins. Co. *v.* Warren, 181 U. S. 73; Kansas *v.* Colorado, 185 U. S. 125; Andrews *v.* Andrews, 188 U. S. 14; Northern Securities Co. *v.* United States, 193 U. S. 197; Turner *v.* Williams, 194 U. S. 279; McCray *v.* United States, 195 U. S. 27; Central of Georgia Ry. Co. *v.* Murphey, 196 U. S. 194; Matter of Heff (Indian), 197 U. S. 488; South Carolina *v.* United States, 199 U. S. 437; Jack *v.* Kansas, 199 U. S. 372; Hodges *v.* United States, 203 U. S. 1; Kansas *v.* Colorado, 206 U. S. 46.

## ARTICLE XI [1]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

State of Georgia *v.* Brailsford et al., 2 Dall. 402; Chisholm, ex., *v.* State of Georgia, 2 Dall. 419; Hollingsworth et al. *v.* Virginia, 3 Dall. 378; Cohens *v.* Virginia, 6 Wh. 264; Osborn *v.* Bank of United States, 9 Wh. 738; Bank of United States *v.* The Planters' Bank, 9 Wh. 904; The Governor of Georgia *v.* Juan Madrazo, 1 Pet. 110; Cherokee Nation *v.* State of Georgia, 5 Pet. 1; Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Pet. 257; Curran *v.* State of Arkansas et al., 15 How. 304; New Hampshire *v.* Louisiana, 108 U. S. 76; Virginia Coupon Cases, 114 U. S. 270; Hagood *v.* Southern, 117 U. S. 52; In re Ayres, 123 U. S. 443; Lincoln County *v.* Luning, 133 U. S. 527; Coupon Cases, 135 U. S. 662; Pennoyer *v.* McConnaughy, 140 U. S. 1; In re Tyler, 149 U. S. 164; Reagan *v.* Farmers' Loan and Trust Co., 154 U. S. 362; Reagan *v.* Mercantile Trust Co., 154 U. S. 413; Scott *v.* Donald, 165 U. S. 58; Tindal *v.* Wesley, 167 U. S. 204; Smyth *v.* Ames, 169 U. S. 466; Fitts *v.* McGhee, 172 U. S. 516; Louisiana *v.* Texas, 176 U. S. 1; Smith *v.* Reeves, 178 U. S. 436; Scranton *v.* Wheeler, 179 U. S. 141; Illinois Central Railroad Co. *v.* Adams, 180 U. S. 28; Prout *v.* Starr, 188 U. S. 537; South Dakota *v.* North Carolina, 192 U. S. 286; Chandler *v.* Dix,

[1] The Eleventh Amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Third Congress, on the 5th of March, 1794; and was declared in a message from the President to Congress, dated the 8th of January, 1798, to have been ratified by the legislatures of three fourths of the states.

194 U. S. 590; Jacobson *v.* Massachusetts, 197 U. S. 11; Graham *v.* Folsom, 200 U. S. 248; Gunter *v.* Atlantic Coast Line, 200 U. S. 273; McNeill *v.* Southern Railway Co., 202 U. S. 543; Mississippi R. R. Commission *v.* Illinois Central R. R., 203 U. 335; Scully *v.* Bird, 209 U. S. 481; Ex parte Young, 209 U. S. 123.

## ARTICLE XII [1]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

In re Green, 134 U. S. 377.

[1] The Twelfth Amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Eighth Congress, on the 12th of December, 1803, in lieu of the original third paragraph of the first section of the second article; and was declared, in a proclamation of the Secretary of State, dated the 25th of September, 1804, to have been ratified by the legislatures of three fourths of the States.

## ARTICLE XIII [1]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

Dred Scott *v.* Sandford, 19 How. 393; White *v.* Hart, 13 Wall. 646; Osborn *v.* Nicholson, 13 Wall. 654; Slaughter-House Cases, 16 Wall. 36; Ex parte Virginia, 100 U. S. 339; Civil Rights Case, 109 U. S. 3; Plessy *v.* Ferguson, 163 U. S. 537; Robertson *v.* Baldwin, 165 U. S. 275; Clyatt *v.* United States, 197 U. S. 207; Hodges *v.* United States, 203 U. S. 1.

## ARTICLE XIV [2]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any

[1] The Thirteenth Amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-eighth Congress, on the 1st of February, 1865, and was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six states, viz: Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

[2] The Fourteenth Amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Thirty-ninth Congress, on the 16th of June, 1866. On the 21st of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two thirds of each House of the Thirty-ninth Congress: Therefore *Resolved*, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed fourteenth amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty of the thirty-six states, viz: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (and the legislature of the same state passed a resolution in April, 1868, to withdraw its consent to it); Oregon,

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Strauder *v.* West Virginia, 100 U. S. 303; Virginia *v.* Rives, 100 U. S. 313; Ex parte Va., 100 U. S. 339; Missouri *v.* Lewis, 101 U. S. 22; Civil Rights Cases, 109 U. S. 3; Louisiana *v.* New Orleans, 109 U. S. 285; Hurtado *v.* California, 110 U. S. 516; Hagar *v.* Reclamation Dist., 111 U. S. 701; Elk *v.* Wilkins, 112 U. S. 94; Head *v.* Amoskeag Mfg. Co., 113 U. S. 9; Barbier *v.* Connolly, 113 U. S. 27; Provident Inst. *v.* Jersey City, 113 U. S. 506; Soon Hing *v.* Crowley, 113 U. S. 703; Wurts *v.* Hoagland, 114 U. S. 606; Ky. R. Rd. Tax Cases, 115 U. S. 321; Campbell *v.* Holt, 115 U. S. 620; Presser *v.* Illinois, 116 U. S. 252; Stone *v.* Farmers' Loan and Trust Co., 116 U. S. 307; Arrowsmith *v.* Harmoning, 118 U. S. 194; Yick Wo *v.* Hopkins, 118 U. S. 356; Santa Clara Co. *v.* S. Pacific R. Rd., 118 U. S. 394; Phila. Fire Assn. *v.* N. Y., 119 U. S. 110; Schmidt *v.* Cobb, 119 U. S. 286; Baldwin *v.* Franks 120 U. S. 678; Hayes *v.* Missouri, 120 U. S. 68; Church *v.* Kelsey, 121 U. S. 282; Pembina Mining Co. *v.* Penna., 125 U. S. 181; Spencer *v.* Merchant, 125 U. S. 345; Dow *v.* Beidelman, 125 U. S. 680; Bank of Redemption *v.* Boston, 125 U. S. 60; Ro Bards *v.* Lamb, 127 U. S. 58; Mo. Pac. Rwy. Co. *v.* Mackey, 127 U. S. 205; Minneapolis and St. Louis Rwy. *v.* Herrick, 127 U. S. 210; Powell *v.* Penna., 127 U. S. 678; Kidd *v.* Pearson 128 U. S. 1; Nashville, Chattanooga, &c., Rwy. *v.* Alabama, 128 U. S. 96; Walston *v.* Nevin, 128 U. S. 578; Minneapolis and St. Louis Rwy. *v.* Beckwith, 129 U. S. 26; Dent *v.* West Va., 129 U. S. 114; Huling *v.* Kaw Valley Rwy. and Improvement Co., 130 U. S. 559; Freeland *v.* Williams, 131 U. S. 405; Cross *v.* North Carolina, 132 U. S. 131; Pennie *v.* Reis, 132 U. S. 464; Sugg *v.* Thornton, 132 U. S. 524; Davis *v.* Beason, 133 U. S. 333; Eilenbecker *v.* Plymouth Co., 134 U. S. 31; Bell Gap R. Rd. Co. *v.* Penna., 134 U. S. 232; Chicago, Milwaukee & St.

September 19, 1866; Vermont, November 9, 1866; Georgia rejected it November 13, 1866, and ratified it July 21, 1868; North Carolina rejected it December 4, 1866, and ratified it July 4, 1868; South Carolina rejected it December 20, 1866, and ratified it July 9, 1868; New York ratified it January 10, 1867; Ohio ratified it January 11, 1867 (and the legislature of the same state passed a resolution in January, 1868, to withdraw its consent to it); Illinois ratified it January 15, 1867; West Virginia, January 16, 1867; Kansas, January 18, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Missouri, January 26, 1867; Indiana, January 20, 1867; Minnesota, February 1, 1867; Rhode Island, February 7, 1867; Wisconsin, February 13, 1867; Pennsylvania, February 13, 1867; Michigan, February 15, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, April 3, 1868; Arkansas, April 6, 1868; Florida, June 8, 1868; Louisiana, July 9, 1868; and Alabama, July 13, 1868. Georgia again ratified the amendment February 2, 1870. Texas rejected it November 1, 1866, and ratified it February 18, 1870. Virginia rejected it January 19, 1867, and ratified it October 8, 1869. The amendment was rejected by Kentucky January 10, 1867; by Delaware, February 8, 1867; by Maryland, March 23, 1867, and was not afterwards ratified by either state.

APPENDIX XX

Paul Rwy. *v.* Minnesota, 134 U. S. 418; Home Ins. Co. *v.* N. Y., 134 U. S. 594; Louisville & Nashville R. Rd. Co. *v.* Woodson, 134 U. S. 614; Leisy *v.* Hardin, 135 U. S. 100; In re Kemmler, 136 U. S. 436; York *v.* Texas, 137 U. S. 15; Crowley *v.* Christensen, 137 U. S. 89; Wheeler *v.* Jackson, 137 U. S. 245; Holden *v.* Minnesota, 137 U. S. 483; In re Converse, 137 U. S. 624; Caldwell *v.* Texas, 137 U. S. 692; Kauffman *v.* Wooters, 138 U. S. 285; Leeper *v.* Texas, 139 U. S. 462; In re Manning, 139 U. S. 504; Natal *v.* Louisiana, 139 U. S. 621; In re Duncan, 139 U. S. 449; In re Shibuya Jugiro, 139 U. S. 291; Lent *v.* Tillson, 140 U. S. 316; New Orleans *v.* N. O. Water W'ks, 142 U. S. 79; McElvaine *v.* Brush, 142 U. S. 155; Kaukauna Water Power Co. *v.* Miss. Canal Co., 142 U. S. 254; Charlotte, Augusta & Col. R. Rd. Co. *v.* Gibbes, 142 U. S. 386; Pacific Ex. Co. *v.* Siebert, 142 U. S., 339 ; Horn Silver Mining Co. *v.* N. Y., 143 U. S. 305; Budd *v.* N. Y., 143 U. S. 517; Schwab *v.* Berggren, 143 U. S. 442; Fielden *v.* Illinois, 143 U. S. 452; N. Y. *v.* Squire, 144 U. S. 175; Brown *v.* Smart, 144 U. S. 454; McPherson *v.* Blacker, 146 U. S. 1; Morley *v.* Lake Shore & Mich. Southern Ry. Co., 146 U. S. 162; Hallinger *v.* Davis, 146 U. S. 314; Yesler *v.* Washington Harbor Line Com'rs., 146 U. S. 646; Butler *v.* Goreley, 146 U. S. 303; Southern Pacific Co. *v.* Denton, 146 U. S. 202; Thorington *v.* Montgomery, 147 U. S. 490; Giozza *v.* Tiernan, 148 U. S. 657; Paulsen *v.* Portland, 149 U. S. 30; Minn. & St. L. Rwy. Co. *v.* Emmons, 149 U. S. 364; Columbus So. Rwy. Co. *v.* Wright, 151 U. S. 470; In re Frederick, 149 U. S. 70; McNulty *v.* Calif., 149 U. S. 645; Lees *v.* United States, 150 U. S. 476; Lawton *v.* Steele, 152 U. S. 133; Montana Co. *v.* St. Louis Mining Co., 152 U. S. 160; Duncan *v.* Missouri, 152 U. S. 377; McKane *v.* Durston, 153 U. S. 684; Marchant *v.* Penna. R. R. Co., 153 U. S. 380; Brass *v.* Stoeser, 153 U. S. 391; Scott *v.* McNeal, 154 U. S. 34; Reagan *v.* Far. Loan & Trust Co., 154 U. S. 362; P., C., C. & St. L. R. R. Co., *v.* Backus, 154 U. S. 421; Interstate Com. Comsn. *v.* Brimson, 154 U. S. 447; Reagan *v.* Mercantile Trust Co., 154 U. S. 447; Pearce *v.* Texas, 155 U. S. 311; Pittsburg & So. Coal Co. *v.* La., 156 U. S. 590; Andrews *v.* Swartz, 156 U. S. 272; St. L. & S. F. Rwy. Co. *v.* Gill, 156 U. S. 649; Stevens, admr., *v.* Nichols, 157 U. S. 370; Beremann *v.* Begcker, 157 U. S. 655; In re Quarles and Butler, 158 U. S. 532; Gray *v.* Connecticut, 159 U. S. 74; Central Land Co. *v.* Laidley, 159 U. S. 103; Moore *v.* Missouri, 159 U. S. 673; Winona & St. Peter Land Co. *v.* Minn., 159 U. S. 528; Iowa Cent. Ry. Co. *v.* Iowa, 160 U. S. 389; Eldridge *v.* Trezevant, 160 U. S. 452; Laing *v.* Rigney, 160 U. S. 531; Gibson *v.* Miss., 162 U. S. 565; Western Union Telegraph Co. *v.* Taggart, 163 U. S. 1; Lowe *v.* Kansas, 163 U. S. 81; Plessy *v.* Ferguson, 163 U. S. 537; Talton *v.* Mayes, 163 U. S. 376; Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112; Mo. Pac. Ry. Co. *v.* Nebraska, 164 U. S. 403; Covington &c. Turnpike Co. *v.* Sandford, 164 U. S. 578; St. Louis &c. Ry. Co. *v.* Mathews, 165 U. S. 1; Gulf &c. Ry. Co. *v.* Ellis, 165 U. S. 150; Jones *v.* Brim, 165 U. S. 180; Adams Ex. Co. *v.* Ohio, 165 U. S. 194; Western Union Tel. Co. *v.* Indiana, 165 U. S. 304; Allgeyer *v.* Louisiana, 165 U. S. 578; Allen *v.* Georgia, 166 U. S. 138; Chicago &c. R. R. Co. *v.* Chicago, 166 U. S. 226; Gladson *v.* Minn., 166 U. S. 427; Sentell *v.* New Orleans &c. R. R. Co., 166 U. S. 698; Davis *v.* Mass., 167 U. S. 43; Turner *v.* New York, 168 U. S. 90; Hodgson *v.* Vermont, 168 U. S. 262; Nobles *v.* Georgia, 168 U. S. 398; McHenry

*v.* Alford, 168 U. S. 651; Holden *v.* Hardy, 169 U. S. 366; Savings & Loan Society *v.* Multnomah County, 169 U. S. 421; Smyth *v.* Ames, 169 U. S. 466; Wilson *v.* North Carolina, 169 U. S. 586; United States *v.* Wong Kim Ark, 169 U. S. 649; Williams *v.* Miss., 170 U. S. 213; Galveston &c. Ry. Co. *v.* Texas, 170 U. S. 226; Magoun *v.* Ill. Trust & Savings Bank, 170 U. S. 283; Williams *v.* Eggleston, 170 U. S. 304; Tinsley *v.* Anderson, 171 U. S. 101; King *v.* Mullins, 171 U. S. 404; New York *v.* Roberts, 171 U. S. 658; Meyer *v.* Richmond, 172 U. S. 82; Blake *v.* McClung, 172 U. S. 239; Orient Ins. Co. *v.* Daggs, 172 U. S. 557; Wilson *v.* Eureka City, 173 U. S. 32; Central Loan & Trust Co. *v.* Campbell Commission Co., 173 U. S. 84; Dewey *v.* Des Moines, 173 U. S. 193; St. Louis &c. Ry. Co. *v.* Paul, 173. U. S. 404; Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592; Lake Shore &c. Ry. Co. *v.* Smith, 173 U. S. 684; Atchison &c. R. R. Co. *v.* Matthews, 174 U. S. 96; Brown *v.* N. J., 175 U. S. 172; Tullis *v.* Lake Erie &c. R. R. Co., 175 U. S. 348; Cumming *v.* Richmond County Board of Education, 175 U. S. 528; Bolln *v.* Nebraska, 176 U. S. 83; Clark *v.* Kansas City, 176 U. S. 114; Roller *v.* Holly, 176 U. S. 398; Weyerhaueser *v.* Minn., 176 U. S. 550; Maxwell *v.* Dow, 176 U. S. 581; Gundling *v.* Chicago, 177 U. S. 183; Ohio Oil Co. *v.* Indiana, 177 U. S. 190; Louisville, &c., R. R. Co. *v.* Schmidt, 177 U. S. 230; Saranac Land & Timber Co. *v.* Comptroller of N. Y., 177 U. S. 318; Carter *v.* Texas, 177 U. S. 442; L'Hote *v.* New Orleans, 177 U. S. 587; Sully *v.* Am. Ntl. Bank, 178 U. S. 289; Wheeler *v.* New York &c. R. R. Co., 178 U. S. 321; Taylor *v.* Beckham, 178 U. S. 548; Am. Sugar Refining Co. *v.* Louisiana, 179 U. S. 89; Williams *v.* Fears, 179 U. S. 270; New York *v.* Barker, 179 U. S. 279; Wisconsin &c. R. R. Co. *v.* Jacobson, 179 U. S. 287; Mason *v.* Missouri, 179 U. S. 328; Devine *v.* Los Angeles, 202 U. S. 313; Cox *v.* Texas, 202 U. S. 446; National Council *v.* State Council, 203 U. S. 151; St. Mary's Petroleum Co. *v.* West Virginia, 203 U. S. 183; Northwestern Life Ins. Co. *v.* Riggs, 203 U. S. 243; Atlantic Coast Line *v.* Florida, 203 U. S. 256; Seaboard Air Line *v.* Florida, 203 U. S. 261; Fairhaven & Westville R. R. Co., *v.* New Haven, 203 U. S. 379; Cahen *v.* Brewster, 203 U. S. 543; Gatewood *v.* North Carolina, 203 U. S. 531; Security Trust Co. *v.* Lexington, 203 U. S. 323; Martin *v.* Pittsburg & Lake Erie R. R., 203 U. S. 284; Board of Education *v.* Illinois, 203 U. S. 553; Hodges *v.* United States, 203 U. S. 1; Alabama & Vicksburg Railway Co. *v.* Mississippi R. R. Commission, 203 U. S. 496; Hatch *v.* Reardon, 204 U. S. 152; Ballard *v.* Hunter, 204 U. S. 241; Western Turf Association *v.* Greenberg, 204 U. S. 359; Cleveland Electric Railway Co. *v.* Cleveland, 204 U. S. 116; Old Wayne Life Association *v.* McDonough, 204 U. S. 8; Chicago, Burlington & Quincy Railway Co. *v.* Babcock, 204 U. S. 585; Walker *v.* McLoud, 204 U. S. 302; Coffey *v.* Harlan County, 204 U. S. 659; Bacon *v.* Walker, 204 U. S. 311; Bachtel *v.* Wilson, 204 U. S. 36; Barrington *v.* Missouri, 205 U. S. 483; Halter *v.* Nebraska, 205 U. S. 34; Wilmington Mining Co. *v.* Fulton, 205 U. S. 60; Tracy *v.* Ginzberg, 205 U. S. 170; Patterson *v.* Colorado, 205 U. S. 454; Chanler *v.* Kelsey, 205 U. S. 466; Sauer *v.* City of New York, 206 U. S. 536; Atlantic Coast Line *v.* North Carolina Corporation Commission, 206 U. S. 1; Buck *v.* Beach, 206 U. S. 392; Bernheimer *v.* Converse, 206 U. S. 516; Hunter *v.* Pittsburgh, 207 U. S. 161; Polk *v.* Mutual Reserve Fund Association, 207 U. S. 310; Consolidated Rendering Co.

*v.* Vermont, 207 U. S. 541; Raymond *v.* Chicago Traction Co., 207 U. S. 20; Central of Georgia Railway *v.* Wright, 207 U. S. 127; Bitterman *v.* Louisville & Nashville Railroad, 207 U. S. 205; Lee *v.* New Jersey, 207 U. S. 67; Ozan Lumber Co. *v.* Union County Bank, 207 U. S. 251; Seaboard Air Line *v.* Seegers, 207 U. S. 73; Heath & Milligan Co. *v.* Worst, 207 U. S. 338; Interstate Railway Co. *v.* Massachusetts, 207 U. S. 79; Cosmopolitan Club *v.* Virginia, 208 U. S. 378; Hairston *v.* Danville and Western Railway, 208 U. S. 598; Northern Pacific Railway *v.* Duluth, 208 U. S. 583; Disconto Gesellschaft *v.* Umbreit, 208 U. S. 570; Ughbanks *v.* Armstrong, 208 U. S. 481; Muller *v.* Oregon, 208 U. S. 412; Darnell & Son *v.* Memphis, 208 U. S. 113; Central Railroad Co. *v.* Jersey City, 209 U. S. 473; Longyear *v.* Toolan, 209 U. S. 414; Hudson Water Co. *v.* McCarter, 209 U. S. 349; Ex parte Young, 209 U. S. 123; Thompson *v.* Kentucky, 209 U. S. 340; Lang *v.* New Jersey, 209 U. S. 467; Londoner *v.* Denver, 210 U. S. 373; Delmar Jockey Club *v.* Missouri, 210 U. S. 324; Cleveland, Cincinnati, etc., Railway Co. *v.* Porter, 210 U. S. 177; Berea College *v.* Kentucky, 211 U. S. 45; Twining *v.* New Jersey, 211 U. S. 78; Home Teleph. and Teleg. Co. *v.* Los Angeles, 211 U. S. 265; Lemieux *v.* Young, 211 U. S. 489; Beers *v.* Glynn, 211 U. S. 477; McClean *v.* Arkansas, 211 U. S. 539; Paddell *v.* New York, 211 U. S. 446; Rusch *v.* John Duncan Land & Min. Co. 211 U. S. 526; North American Cold Storage Co. *v.* Chicago, 211 U. S. 306; New York ex rel. Sibz *v.* Hesterberg, 211 U. S. 310; Thomas *v.* Texas, 212 U. S. 278; Hammond Packing Co. *v.* Arkansas, 212 U. S. 322; Waters-Pierce Co. *v.* Texas, 212 U. S. 86; Knoxville *v.* Knoxville Water Co. 212 U. S. 1, New York C. & H. R. R. Co. *v.* United States, 212 U. S. 481; Louisville & N. R. Co. *v.* Central Stock-Yards Co., 212 U. S. 132; Ontario Land Co. *v.* York, 212 U. S. 152; Mozer *v.* Peabody, 212 U. S. 78; Waters-Pierce Oil Co. *v.* Deselms, 212 U. S. 159; Keerl *v.* Montana, 213 U. S. 135; Bonner *v.* Gonnan, 213 U. S. 86; Welch *v.* Swasey, 214 U. S. 91; District of Columbia *v.* Brooke, 214 U. S. 138; Interstate Com. Commission *v.* Illinois C. R. Co., 215 U. S. 452; Southern R. Co. *v.* Greene, 216 U. S. 400; Louisville & N. R. Co. *v.* Gaston, 216 U. S. 418; Alvarez y Sanchez *v.* United States, 216 U. S. 167; Missouri P. R. Co. *v.* Kansas ex rel. Taylor, 216 U. S. 262; Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358; Southwestern Oil Co. *v.* Texas, 217 U. S. 114; Brown-Fomian Co. *v.* Kentucky, 217 U. S. 563; Williams *v.* Arkansas, 217 U. S. 79; Standard Oil Co. *v.* Tennessee ex rel. Cales, 217 U. S. 413; Missouri P. R. Co. *v.* Nebraska, 217 U. S. 196; Kidd, D. & R. Co. *v.* Musselman Grocer Co., 217 U. S. 461; Grenada Lumber Co. *v.* Mississippi, 217 U. S. 433; Louisville & N. R. Co. *v.* Milton, 218 U. S. 36; Watson *v.* Maryland, 218 U. S. 173; Western U. Teleg. Co. *v.* Commercial Milling Co., 218 U. S. 406; Griffith *v.* Connecticut, 218 U. S. 563; United States *v.* Heinze, 218 U. S. 532; Ling Su Fass *v.* United States, 218 U. S. 302; Illinois C. R. Co. *v.* Kentucky, 218 U. S. 551; Cincinnati, I. & W. R. Co. *v.* Connersville, 218 U. S. 336; Shevlin-Carpenter Co. *v.* Minnesota, 218 U. S. 57; Franklin *v.* South Carolina, 218 U. S. 161; Ong Chang Wing *v.* United States, 218 U. S. 272.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when

the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

McPherson *v.* Blacker, 146 U. S. 1.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Crandall *v.* The State of Nevada, 6 Wall. 35; Paul *v.* Virginia, 8 Wall. 168; Ward *v.* Maryland, 12 Wall. 418; Slaughter-House Cases, 16 Wall. 36; Bradwell *v.* The State, 16 Wall. 130; Bartemeyer *v.* Iowa, 18 Wall. 129; Minor *v.* Happersett, 21 Wall. 162; Walker *v.* Sauvinet, 92 U. S. 90; Kennard *v.* Louisiana ex rel. Morgan, 92 U. S. 480; United States *v.* Cruikshank, 92 U. S. 542; Munn *v.* Illinois, 94 U. S. 113.

## ARTICLE XV [1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

[1] The Fifteenth Amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Fortieth Congress on the 27th of February, 1869, and was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been

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SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

United States *v.* Reese et al., 92 U. S. 214; United States *v.* Cruikshank et al., 92 U. S. 542; Neal *v.* Delaware, 103 U. S. 370; United States *v.* Waddell et al., 112 U. S. 76; Ex parte Yarbrough, 110 U. S. 651; McPherson *v.* Blacker, 146 U. S. 1; James *v.* Bowman, 190 U. S. 127; Hodges *v.* United States, 203 U. S. 1.

## RATIFICATIONS OF THE CONSTITUTION

The Constitution was adopted by a convention of the States September 17, 1787, and was subsequently ratified by the several States, in the following order, viz.:—

Delaware, December 7, 1787.
Pennsylvania, December 12, 1787.
New Jersey, December 18, 1787.
Georgia, January 2, 1788.
Connecticut, January 9, 1788.
Massachusetts, February 6, 1788.
Maryland, April 28, 1788.
South Carolina, May 23, 1788.
New Hampshire, June 21, 1788.
Virginia, June 26, 1788.
New York, July 26, 1788.
North Carolina, November 21, 1789.
Rhode Island, May 29, 1790.

The State of Vermont, by convention, ratified the Constitution on the 10th of January, 1791, and was, by an Act of Congress of the 18th of February, 1791, "received and admitted into this Union as a new and entire member of the United States of America."

ratified by the legislatures of twenty-nine of the thirty-seven States. The dates of these ratifications (arranged in the order of their reception at the Department of State) were: From North Carolina, March 5, 1869; West Virginia, March 3, 1869; Massachusetts, March 9–12, 1869; Wisconsin, March 9, 1869; Maine, March 12, 1869; Louisiana, March 5, 1869; Michigan, March 8, 1869; South Carolina, March 16, 1869; Pennsylvania, March 26, 1869; Arkansas, March 30, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; Illinois, March 5, 1869; Indiana, May 13–14, 1869; New York, March 17–April 14, 1869 (and the legislature of the same State passed a resolution January 5, 1870, to withdraw its consent to it); New Hampshire, July 7, 1869; Nevada, March 1, 1869; Vermont, October 21, 1869; Virginia, October 8, 1869; Missouri, January 10, 1870; Mississippi, January 15–17, 1870; Ohio, January 27, 1870; Iowa, February 3, 1870; Kansas. January 18–19, 1870; Minnesota, February 19, 1870; Rhode Island, January 18, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870. The State of Georgia also ratified the amendment February 2, 1870.

## RATIFICATIONS OF THE AMENDMENTS TO THE CONSTITUTION

The first ten of the preceding articles of amendment (with two others which were not ratified by the requisite number of States) were submitted to the several State legislatures by a resolution of Congress which passed on the 25th of September, 1789, at the first session of the First Congress, and were ratified by the legislatures of the following States: —

New Jersey, November 20, 1789.
Maryland, December 19, 1789.
North Carolina, December 22, 1789.
South Carolina, January 19, 1790.
New Hampshire, January 25, 1790.
Delaware, January 28, 1790.
Pennsylvania, March 10, 1790.
New York, March 27, 1790.
Rhode Island, June 15, 1790.
Vermont, November 3, 1791.
Virginia, December 15, 1791.

The acts of the legislatures of the States ratifying these amendments were transmitted by the governors to the President, and by him communicated to Congress. The legislatures of Massachusetts, Connecticut, and Georgia do not appear by the record to have ratified them.

The Eleventh Article was submitted to the legislatures of the several States by a resolution of Congress passed on the 5th of March, 1794, at the first session of the Third Congress; and on the 8th of January, 1798, at the second session of the Fifth Congress, it was declared by the President, in a message to the two Houses of Congress, to have been adopted by the legislatures of three fourths of the States, there being at that time sixteen States in the Union.

The Twelfth Article was submitted to the legislatures of the several States, there being then seventeen States, by a resolution of Congress passed on the 12th of December, 1803, at the first session of the Eighth Congress, and was ratified by the legislatures of three fourths of the States in 1804, according to a proclamation of the Secretary of State dated the 25th of September, 1804.

The Thirteenth Article was submitted to the legislatures of the several States, there being then thirty-six States, by a resolution of Congress passed on the 1st of February, 1865, at the second session of the Thirty-eighth Congress, and was ratified, according to a proclamation of the Secretary of State dated December 18, 1865, by the legislatures of the following States: —

Illinois, February 1, 1865.
Rhode Island, February 2, 1865.
Michigan, February 2, 1865.
Maryland, February 3, 1865.

New York, February 3, 1865.
West Virginia, February 3, 1865.
Maine, February 7, 1865.
Kansas, February 7, 1865.
Massachusetts, February 8, 1865.
Pennsylvania, February 8, 1865.
Virginia, February 9, 1865.
Ohio, February 10, 1865.
Missouri, February 10, 1865.
Indiana, February 16, 1865.
Nevada, February 16, 1865.
Louisiana, February 17, 1865.
Minnesota, February 23, 1865.
Wisconsin, March 1, 1865.
Vermont, March 9, 1865.
Tennessee, April 7, 1865.
Arkansas, April 20, 1865.
Connecticut, May 5, 1865.
New Hampshire, July 1, 1865.
South Carolina, November 13, 1865.
Alabama, December 2, 1865.
North Carolina, December 4, 1865.
Georgia, December 9, 1865.

The following States not enumerated in the proclamation of the Secretary of State also ratified this amendment: —

Oregon, December 11, 1865.
California, December 20, 1865.
Florida, December 28, 1865.
New Jersey, January 23, 1866.
Iowa, January 24, 1866.
Texas, February 18, 1870.

The Fourteenth Article was submitted to the legislatures of the several States, there being then thirty-seven States, by a resolution of Congress passed on the 16th of June, 1866, at the first session of the Thirty-Ninth Congress, and was ratified, according to a proclamation of the Secretary of State dated July 28, 1868, by the legislatures of the following States: —

Connecticut, June 30, 1866.
New Hampshire, July 7, 1866.
Tennessee, July 19, 1866.
New Jersey, September 11, 1866.[1]
Oregon, September 19, 1866.[2]
Vermont, November 9, 1866.

[1] New Jersey withdrew her consent to the ratification in April, 1868.

[2] Oregon withdrew her consent to the ratification, 15th of October, 1868.

New York, January 10, 1867.
Ohio, January 11, 1867.[1]
Illinois, January 15, 1867.
West Virginia, January 16, 1867.
Kansas, January 18, 1867.
Maine, January 19, 1867.
Nevada, January 22, 1867.
Missouri, January 26, 1867.
Indiana, January 29, 1867.
Minnesota, February 1, 1867.
Rhode Island, February 7, 1867.
Wisconsin, February 13, 1867.
Pennsylvania, February 13, 1867.
Michigan, February 15, 1867.
Massachusetts, March 20, 1867.
Nebraska, June 15, 1867.
Iowa, April 3, 1868.
Arkansas, April 6, 1868.
Florida, June 9, 1868.
North Carolina, July 4, 1868.[2]
Louisiana, July 9, 1868.
South Carolina, July 9, 1868.[2]
Alabama, July 13, 1868.
Georgia, July 21, 1868.[2]

The State of Virginia ratified this amendment on the 8th of October, 1869, subsequent to the date of the proclamation of the Secretary of State.[2]

The States of Delaware, Maryland, Kentucky, and Texas rejected the amendment.

The Fifteenth Article was submitted to the legislatures of the several States, there being then thirty-seven States, by a resolution of Congress passed on the 27th of February, 1869, at the first session of the Forty-first Congress; and was ratified, according to a proclamation of the Secretary of State dated March 30, 1870, by the legislatures of the following States: —

Nevada, March 1, 1869.
West Virginia, March 3, 1869.
North Carolina, March 5, 1869.
Louisiana, March 5, 1869.
Illinois, March 5, 1869.
Michigan, March 8, 1869.
Wisconsin, March 9, 1869.
Massachusetts, March 12, 1869.
Maine, March 12, 1869.

[1] Ohio withdrew her consent to the ratification in January, 1868.

[2] North Carolina, South Carolina, Georgia, and Virginia had previously rejected the amendment.

South Carolina, March 16, 1869.
Pennsylvania, March 26, 1869.
Arkansas, March 30, 1869.
New York, April 14, 1869.[1]
Indiana, May 14, 1869.
Connecticut, May 19, 1869.
Florida, June 15, 1869.
New Hampshire, July 7, 1869.
Virginia, October 8, 1869.
Vermont, October 21, 1869.
Alabama, November 24, 1869.
Missouri, January 10, 1870.
Mississippi, January 17, 1870.
Rhode Island, January 18, 1870.
Kansas, January 19, 1870.
Ohio, January 27, 1870.[2]
Georgia, February 2, 1870.
Iowa, February 3, 1870.
Nebraska, February 17, 1870.
Texas, February 18, 1870.
Minnesota, February 19, 1870.

The State of New Jersey ratified this amendment on the 21st of February, 1871, subsequent to the date of the proclamation of the Secretary of State.[3]

The States of California, Delaware, Kentucky, Maryland, Oregon, and Tennessee rejected this amendment.

[1] New York withdrew her consent to the ratification, January 5, 1870.

[2] Ohio had previously rejected the amendment May 4, 1869.

[3] New Jersey had previously rejected the amendment.

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[1] This publication is quoted very frequently in many parts of this volume.

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The Riverside Press
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